82-5744

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-

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SUPREME COURT, U.S.

DOUGLAS R. MEEKS,

Petitioner,

v.

FLORIDA
~~LOUIS L. WAINWRIGHT,~~

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

JUNE RICE
STEPHEN STITT
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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

I. Whether the Court below disregarded petitioner's Eighth and Fourteenth Amendment rights in refusing, as a matter of law, to allow petitioner, a black man, to present evidence that racial attitudes are the most significant variables in determining which factually-similar Florida homicide cases result in death sentences and which do not, and that this racial determiner operates most strongly to the jeopardy of a black defendant, who, like petitioner, is accused of killing a white person; and that such racial prejudice had a determining role in petitioner's specific sentence, which involved a homicide during near race-riot conditions in a small community where past and present practices by both private and government agencies are documentably fraught with racial prejudice, hatred and violence against members of petitioner's race?

II. Whether the court below erred in refusing to hold that one or more of the following errors at trial were so fundamental in nature as to require, under the Sixth, Eighth and Fourteenth Amendment requirements of regularity in death penalty procedures, a retrial as to guilt and/or sentence:

(A) at the sentencing phase of the trial, the jury was instructed that consideration of mitigating circumstances "shall be" those enumerated in the Florida Statute;

(B) at the sentencing phase of the trial, the jury was not instructed that the State had the burden of proving aggravating circumstances beyond a reasonable doubt, although the Florida Supreme Court had previously held this to be an essential feature of the Florida Statute;

(C) at the sentencing phase of trial the judge relied upon self-incriminating statements made to court-appointed psychiatrists who were examining petitioner only for sanity/competency to stand trial, and without notice to

either petitioner or his counsel that the reports would be otherwise used;

(D) at the sentencing phase of the trial, the jury was informed by the prosecutor, and the judge expressly determined, that the underlying felony of robbery could be considered as more than one "aggravating circumstance"; the state supreme court subsequently ruled otherwise in a case to which petitioner was not a party? See Provence v. State, 377 So.2d 703 (Fla. 1976).

III. Whether the court below erred in determining that the assistance given petitioner by counsel at the conviction, sentencing or appeal stage of his case met the minimum standards of the Sixth and Fourteenth Amendments?

IV. Whether the court below erred in implicitly ruling that petitioner was afforded an adequate hearing on his claim of ineffective assistance of counsel, where the trial court

(A) denied petitioner funds to subpoena witnesses necessary to presentation of his case;

(B) denied petitioner funds with which to depose trial counsel;

(C) refused to admit any evidence that racial prejudice worked to petitioner's disadvantage at trial and in sentencing;

(D) refused to allow petitioner funds with which he could obtain a copy of the transcript of the trial of the co-felon who received a life sentence, which transcripts

(1) would provide information about the community knowledge toward the offense and toward the accused, relating to whether petitioner was judged by a fair and impartial jury; and

(2) would serve as a comparison of voir dire examinations conducted by petitioner's counsel and another attorney under similar community and trial conditions, relating to whether petitioner received constitutionally-adequate representation?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-

DOUGLAS R. MEEKS,

Petitioner,

-v-

LOUIE L. WAINWRIGHT,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF FLORIDA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida (No. 59,958, June 17, 1982) is not yet reported. It is set out in Appendix A, infra.

JURISDICTION

The judgment of the Florida Supreme Court sought to be reviewed was entered on June 17, 1982, rehearing denied September 13, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves Florida Statute §921.141, set out in Appendix D.

STATEMENT OF THE CASE

Petitioner Douglas R. Meeks has been sentenced to die for first degree murder. The Supreme Court of Florida affirmed the judgment of the trial court, Meeks v. State, 339 So.2d 186 (Fla. 1976), then remanded the case to the trial court for a hearing pursuant to Gardner v. Florida, 430 U.S. 349 (1977). Petitioner was resentenced to death by the same trial judge, and the Supreme Court of Florida affirmed, Meeks v. State, 364 So.2d 461 (Fla.1978). A death warrant was signed authorizing petitioner's execution on February 13, 1980, and in a post-conviction proceeding was stayed by order of the Supreme Court of Florida issued February 11, 1980. On March 20, 1980, that court remanded the cause for an evidentiary hearing on the question of effectiveness of counsel in the original trial and appeal, Meeks v. Florida, 382 So.2d 673 (1980), and on June 17, 1982, affirmed the denial of relief made by the original trial judge. A new death warrant was then signed by the governor, with the execution set for November 16, 1982.

The facts of the underlying conviction are that on November 12, 1974, petitioner was arrested and, together with Homer Hardwick, charged with the robbery of a convenience store and murder of a white customer therein. The crime occurred in Perry, Florida during a period when the city had been under curfew due to racial violence.

With counsel present, two court-appointed psychiatrists subsequently examined petitioner, a man of "below normal intelligence", for sanity and competency to stand trial. According to their reports, the defendant incriminated himself, was sane at the time of the crime, and was competent to stand trial. The psychiatrists account of petitioner's incriminating statements was submitted to the trial judge and expressly relied upon by him in sentencing petitioner to death. (See P. 3 of "Written Findings Upon Which Sentence of Death is Based," attached hereto as Appendix E.)

At trial, defense counsel conducted an extremely abbreviated voir dire examination of the prospective jurors, during which 11 of 12 seated to decide the verdict and recommend sentence stated that they had heard about the case prior to the court proceeding. The defense rested without calling any witnesses and the jury returned a verdict of guilty on all charges at 4:52 p.m. At 5:05 p.m. the sentencing phase began. Defense counsel called one witness, the criminal activities clerk for the Sheriff's office, who testified only that she had no record of outstanding charges against the petitioner in other counties. On cross examination, however, the prosecutor was allowed to elicit testimony as to a pending murder charge in Taylor County. After argument by counsel and instructions by the judge, the jury retired at 5:40 p.m. Twenty-three minutes later, the jury returned with a recommendation that the penalty imposed be death. The court immediately imposed a sentence of death on the murder charge, life on the robbery charge, fifteen years on the assault charge, to run consecutively to the life sentence, and fifteen years on the firearms charge to run consecutively to the fifteen year sentence for assault.

The evidence introduced at petitioner's trial included the following: two young men entered the Junior Food Store in Perry, Florida at approximately 8:00 p.m. on November 6, 1979. Dianne Allen, an employee of the store, was standing by the cash register talking with Lloyd Walker, a teenage customer. No one else was in the store. One young man, identified as petitioner's accused co-felon, Homer Hardwick, grabbed Walker around the neck. The other young man, identified as petitioner, held a gun and requested money from Ms. Allen. Then the four walked into a room in the back of the store where Walker and Allen were instructed to lie on the floor. Allen testified that next "they started shooting". Allen was shot in the shoulder, Walker in the head. Allen subsequently called the police by telephone; Walker died six days later.

On April 14-16, 1975, petitioner's accused co-felon Hardwick, a larger, smarter man who had been raised in Perry, was

tried, convicted and sentenced to life imprisonment.

In March, 1975, petitioner was convicted of a separate murder at a convenience store in the same town seven days prior to the murder in the case here presented for review. He was given a still more abbreviated defense by the same trial counsel and, the jury having been told he was already under a separate sentence of death, he was again sentenced to die. The issues in the latter trial are in many respects identical to, and will be controlled by, those here presented for review.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW.

Petitioner's request, made under the Eighth and Fourteenth Amendments, that he be allowed to present evidence that imposition of the death penalty in Florida, and imposition of his specific sentence of death at the time it was rendered in Perry, Florida, are products of racial determiners, was pleaded in ¶14(d) of his motion for post-conviction relief under Fla. R. Crim. P. §3.850, attached hereto as Appendix C. The trial court's initial rejection of the request was affirmed by the Florida Supreme Court in Meeks v. Florida, 382 So.2d 673 (Fla. 1980), attached hereto as Appendix B, in which each member of the court joined one of three separate opinions addressing the question, and which remanded the cause for an evidentiary hearing on the effectiveness of trial counsel. At that hearing, petitioner requested the right to present evidence that his specific death sentence was determined by racial bias evident in state-wide sentencing patterns and evident specifically in Perry, Florida, at the time of the crime charged and at the time of trial, such that the perfunctory voir dire examination of prospective jurors by trial counsel was vastly inadequate to eliminate that prejudice. The trial court's refusal to admit evidence on this issue was appealed (see "Statement of Judicial Acts to be Reviewed," attached hereto in Appendix C), and was affirmed by the Florida Supreme Court in Meeks v. State (No. 59, 958, June 17, 1982, rehearing denied September 13, 1982 , attached in Appendix A).

Petitioner's claim that certain errors at trial and sentencing were so fundamental in nature as to require retrial under constitutional requirements of regularity in death penalty procedures was pleaded in ¶14(F) of his motion for post-conviction relief under Fla. R. Crim. P. §3.850, attached hereto as Appendix C, and in "Ground Six" of his supplement to motion for post-conviction relief, attached hereto in Appendix C; and was rejected by both the trial court and the Supreme Court of Florida (Appendix A).

Petitioner's claim that his assistance by counsel did not meet the standards of the Sixth and Fourteenth Amendments was pleaded in ¶14(A) of his motion for post-conviction relief under Fla. R. Crim. P. §3.850, attached hereto as Appendix C, and at the abbreviated evidentiary hearing held thereafter. The trial court's denial of relief was affirmed by the Florida Supreme Court by opinion attached as Appendix A.

The trial judge's denial, at the post-conviction evidentiary hearing, of petitioner's request for funds to subpoena witnesses, to depose trial counsel, and to reproduce essential documents, was affirmed by the Florida Supreme Court by judgment attached hereto as Appendix A. (See also "Statement of Judicial Acts to be Reviewed", attached hereto in Appendix C.)

REASONS FOR GRANTING THE WRIT

This petition asks:

1) whether state courts may entirely refuse to hear evidence that a death penalty statute as applied is guided by racial animus either generally or in the specific case at bar;

2) whether certain trial errors are so fundamental to the application of a state death penalty statute that retrial as to guilt and/or sentence is made necessary by the standards of the Sixth, Eighth, and Fourteenth Amendments.

3) what constitutes the minimal contribution counsel can make to his client's defense without infringing the standards of the Sixth and Fourteenth Amendments; and

4) whether an indigent state prisoner is entitled to funds to subpoena essential witnesses, to depose trial counsel, and to produce essential documents at an evidentiary hearing on the adequacy of that counsel's representation?

I

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE COURT BELOW ERRED IN REFUSING AS A MATTER OF LAW TO ALLOW PETITIONER, A BLACK MAN, TO PRESENT EVIDENCE (1) THAT RACIAL ATTITUDES ARE THE MOST SIGNIFICANT DETERMINER IN SELECTING WHICH FACTUALLY-SIMILAR HOMICIDE CASES RESULT IN DEATH SENTENCES, AND THAT THIS RACIAL DETERMINER OPERATES MOST STRONGLY TO THE JEOPARDY OF A BLACK DEFENDANT WHO, LIKE PETITIONER, STANDS ACCUSED OF KILLING A WHITE PERSON; AND (2) THAT RACIAL PREJUDICE WAS A DETERMINER OF PETITIONER'S SPECIFIC SENTENCE WHICH INVOLVED A HOMICIDE DURING NEAR RACE-RIOT CONDITIONS IN A COMMUNITY WHERE PAST AND PRESENT PRACTICES ARE DOCUMENTABLY GUIDED BY RACIAL ANIMUS.

In his dissenting opinion in Furman v. Georgia, Mr. Justice Powell stated:

> "Although not presented by any of the petitioners today, a different argument, premised on the Equal Protection Clause, might well be made. If a Negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established."

In support of his proposition, Mr. Justice Powell cited an earlier opinion authored by Mr. Justice Blackmun, another Furman dissenter, during his tenure on the U.S. Court of Appeals for the Eighth Circuit.

Petitioner's contention is precisely the claim contemplated by Justice Powell and Justice Blackmun. Yet the lower court has refused even to receive evidence on the point. Petitioner has had no benefit of judicial process through which he may present his claim, and no adversary proceeding in which he may detail and define its legal significance.

Petitioner can show through competent evidence that when the facts of the cases are held neutral, he, a black person accused of killing a white person, was more than five times more likely to receive the penalty of death than a similarly-situated white defendant. This comparison focuses on the race of the defendant, rather than that of the victim, which is held constant. If the race of the victim is also considered, petitioner can show that his jeopardy of receiving a death penalty is overwhelmingly higher than a white person accused of murdering a black person: no such offender has ever been executed in Florida, and only three are on death row today. Petitioner, through competent evidence, can

show that when all legally-cognizable factual differences in Florida homicide cases are equalized, race is the single most significant determiner of death penalty imposition.

Additionally, petitioner has claimed the right to show that his specific sentence was the product of racial fear and animus existing at the specific time and in the particular community where the crime, arrest and trial occurred. Again, the lower court has refused to allow the introduction of evidence in support of the claim.

Petitioner can produce overwhelming evidence that Taylor County, Florida and the city of Perry, Florida have a long and documented history of racial hatred, discrimination and violence against black people perpetrated by both private and governmental agencies. He can establish that at the time of his arrest and of the crime charged, racial violence stemming from the shotgun-killing of a black man seeking service at a bar open to all white persons had led to the emergency closing of the local high school, and to imposition of a municipal curfew. Petitioner can also show that affidavits signed by citizens of Perry, Florida and filed on the co-felon's behalf by his counsel, aver that there was a "strong undercurrent of racial unrest in Taylor County" at the time of petitioner's trial, evidenced by "near-riot" conditions and "racial friction" that would prevent a fair and impartial trial. He can show that the voir dire examination of prospective jurors by trial counsel was entirely inadequate to protect his right to an impartial jury.

The lower court has refused to allow petitioner to present competent evidence showing that the death sentence imposed upon him is unconstitutional under two independent lines of decisions by the United States Supreme Court. First, the common denominator of the majority opinions in Furman is that the death penalty must not be "capriciously" imposed (92S.Ct. at 2762, opinion of Stewart, J., concurring). A death penalty whose imposition is guided by racial considerations is, of course, legally capricious.

Second, a long line of United States Supreme Court rulings has established that race is the most constitutionally suspect of all factors which may guide the law, especially when the result

works to the disadvantage of black people, toward whose plight the civil war amendments were addressed. Judicial scrutiny under the Equal Protection Clause is at its most demanding

> ". . . in the area of the law in which the Framers obviously meant it to apply -- classifications based on race or on national origin, the first cousin of race . . . " (Trimble v. Gordon, 430 U.S. 762, 777 (1977) opinion of Rehnquist, J., dissenting.)

Since 1886, this Court has consistently enjoined the execution of laws which, though neutral on their face, have been applied in a racially discriminatory pattern. See, e.g., Yick Wo. v. Hopkins, 118 U.S. 356. The Court has affirmed that the application of "a law neutral on its face and serving ends otherwise within the power of government" may nonetheless be enjoined where the pattern of application shows a "purpose" to discriminate by race, Washington v. Davis, 426 U.S. 229, 242 (1976), and importantly, the Court has consistently ruled that such a purpose need not be established through direct evidence of the state actor's subjective intent. Rather, actionable "purpose" can be demonstrated inferentially through data, and relief can be granted even if the disparate imposition of the law was caused by ignorance or unconscious racial bias rather than by a subjective, conscious design to disadvantage black people. In Rose v. Mitchell, 99 S.Ct. 2993 (1979), Mr. Justice Blackmun spoke for four other Justices in observing that

> " . . . we also cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious."

A grant of the writ of certiorari in petitioner's case could clarify the responsibilities of state courts to hear evidence of racial discrimination in their death penalty processes.

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE COURT BELOW ERRED IN FAILING TO HOLD THAT CERTAIN INTERPRETATIONS OF THE FLORIDA DEATH PENALTY STATUTE MUST BE APPLIED TO ALL WHO WOULD BE EXECUTED IN THE STATE.

In its early opinions construing Florida's new post-Furman death penalty statute, the Florida Supreme Court has held that

> 1) statutory "aggravating circumstances" must be proven "beyond a reasonable doubt" before the jury which recommends the penalty or the judge who imposes it, are to consider them, State v. Dixon, 283 So.2d 1 (1973);
>
> 2) During the sentencing phase of a capital trial, the advisory jury is not to be informed that the defendant has another murder charge pending atainst him, Elledge v. State, 346 So.2d 998 (1977);
>
> 3) in a case of felony murder, an underlying felony of robbery must be considered as only one "aggravating circumstance", rather than two or more, Provence v. State, 377 So. 2d 703 (Fla. 1976);

and the United States Supreme Court has ruled that

> 4) consideration of "mitigating circumstances" at sentencing may not be limited by a closed statutory list, Lockett v. Ohio, 438 U.S. 586 (1978); and
>
> 5) defendants are entitled to full warning of the use against them at sentencing of psychiatric examinations taken to determine competency to stand trial. Estelle v. Smith, 101 S.Ct. 1866 (1981).

In petitioner's case, (1) the sentencing jury was not informed of the state's burden in proving aggravating circumstances beyond a reasonable doubt, and there is no indication of record that the sentencing judge knew of the burden; (2) the sentencing jury was informed of a separate murder charge pending against petitioner; (3) the sentencing jury was informed by the prosecutor, and the sentencing judge expressly determined, that the underlying felony of robbery could be considered as more than one aggravating circumstance; (4) the sentencing jury was informed that mitigating circumstances "shall be limited" to those enumerated in the statute; and (5) in imposing sentence, the trial judge expressly relied upon incriminating statements made by petitioner to psychiatrists examining him for competency to stand trial.

Manifestly, any one of these errors could have determined the ultimate imposition of the death penalty -- especially where, as in Florida, the recommendation of the advisory jury is determined by bare majority vote.

The statutory requirement of proving aggravating circumstances "beyond a reasonable doubt" had been explained by the Florida Supreme Court prior to petitioner's sentencing trial. The other sentencing errors noted above have been held to constitute reversible error in subsequent cases to which petitioner was not a party. Outcome-determinative requirements such as these should be applied to all persons sentenced to death in Florida, in view of the federal constitutional requirement, enunciated in Furman v. Georgia, Proffitt v. Florida and Godfrey v. Georgia, that the death penalty must be applied through procedures which are regular and even-handed in their application. This result also seems compelled by the decisions of this Court governing the retroactive application of constitutional rulings, for the errors lie at the heart of the fact-finding process upon which the decision whether to execute is based. Cf. Linkletter v. Walker, 381 U.S. 618 (1965).

III.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE COURT BELOW ERRED IN RULING THAT THE ASSISTANCE OF COUNSEL RECEIVED BY PETITIONER WAS ADEQUATE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The standard by which the Supreme Court of Florida judges the effectiveness of counsel, set out in Knight v. State, 394 So.2d 997 (1981), differs in substantive measure from that announced by the United States Court of Appeals for the Eleventh Circuit in Washington v. Strickland, F.2d____ , (4/23/82) / rehearing en banc granted. Through petitioner's cause this Court could resolve the conflict between a state court of last resort and a federal court of appeals. And petitioner's cause presents an opportunity to lend meaning to that guarantee, through its application to a case where

(A) at the conviction stage of the bifurcated trial, counsel

(1) failed to request a change of venue upon ascertaining that all but one of the prospective jurors had prior information regarding the case and that there was strong racial prejudice prevalent and readily apparent in Perry, Florida, which would work to petitioner's extreme disadvantage;

(2) failed to conduct a reasonably effective voir dire

examination regarding proble juror preconceptions noted in Paragraph (1) above;

(3) failed to depose the witnesses introduced at trial rather than examine them for the first time in the presence of the jury;

(4) failed to adequately investigate the case (counsel evidently spent a total of only four to seven hours in "investigation" plus three hours meeting with petitioner);

(5) failed to protect petitioner from instructions, given to the jury by the court, which went beyond the evidence introduced at trial and which provided grounds for improper inference on petitioner's failure to testify;

(6) failed to protect petitioner from improper introduction of fingerprint evidence of an accused co-felon tried separately (suppressed at the co-felon's <u>own</u> trial);

(7) failed to argue that the jury should consider the lesser included offense of second degree murder, especially in light of petitioner's psychological history and grossly diminished mental capacity; and

(B) at the sentencing stage of the bifurcated trial, counsel

(1) admitted on the record that he was wholly unprepared for the sentencing phase of the bifurcated trial;

(2) neither contacted the petitioner's family nor otherwise attempted to offer evidence of petitioner's substantial psychological disability and near-retarded intelligence, including his susceptibility to being led by the larger, smarter co-felon, who received a life sentence;

(3) offered, as petitioner's only witness and only evidence at the sentencing phase of trial, the clerk of court, who through counsel's blunder, testified that petitioner had another pending murder charge in the same county;

(4) failed to protect petitioner from improper and misleading argument by the prosecutor at the sentencing phase of the trial, including statements that

(a) the jury should not consider the fact that the petitioner had no significant history of criminal activity as a mitigating circumstance;

(b) a "life sentence" for first degree murder is identical to a "life sentence" for robbery;

(c) contemporaneous convictions should be considered as aggravating circumstances;

(d) petitioner has a pending murder charge, a non-statutory aggravating circumstance;

(e) that petitioner caused a great risk of harm (leaving out the statutory requirement of "to many persons"), a statutory aggravating circumstance which does not apply;

(f) that the petitioner hindered a government function when there is no evidence to support such an aggravating circumstance; and

(g) that the offense was heinous, atrocious and cruel, also a statutory aggravating circumstance for which there was no evidence.

(5) Allowed, without objections, instructions to the jury

(a) which charged that consideration of mitigating circumstances "shall be limited to those enumerated in the statute;

(b) which failed to charge that the burden of proof upon the state, in its effort to show "aggravating circumstances", is "beyond a reasonable doubt", as earlier held by the Florida Supreme Court in Dixon v. State; and

(6) failed to protect petitioner from self-incriminating statements made to court-appointed psychiatrists, which statements were relied upon by the trial judge in imposition of sentence without affording petitioner the right of confrontation. See Estelle v. Smith, 101 S.Ct.1866 (198); and

(7) on the appeal of petitioner's conviction and sentence, counsel

(a) failed to preserve objection to every one of the substantial errors of law cited above except (B)(4)(b), and thereby waived appellate review, and

(b) allowed petitioner, a man of "borderline retarded" mental capacity, to testify without advice or presence of counsel at the trial of an accused co-felon, and there to incriminate himself under oath regarding the conviction on appeal as well as provide a substantial possibility of community inflammation and prejudice regarding a pending murder charge to be tried less than two months later in the same community.

IV.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE COURT BELOW ERRED IN REFUSING TO ORDER FUNDS WITH WHICH PETITIONER COULD SUBPOENA ESSENTIAL WITNESSES, TO DEPOSE TRIAL COUNSEL, AND TO PRODUCE DOCUMENTS ESSENTIAL TO A FAIR HEARING ON THE EFFECTIVENESS OF TRIAL COUNSEL.

Petitioner was denied funds with which he could have secured essential portions of the trial and sentencing transcripts of the accused co-felon, who received a life sentence, in order to provide a comparison of representation by another local attorney, in the co-felon's case, who (1) conducted a much more extensive voir dire examination, and (2) protected his client's rights and interests at trial and at sentencing, including a successful demand that the "beyond a reasonable doubt" instruction regarding proof of aggravating circumstances be given, and including his presentation of witnesses on his client's behalf at the sentencing stage of trial.

Petitioner also requested and was denied (1) funds for the use of expert witnesses to inform the court on the incidence of racially discriminatory attitudes in Perry, Florida, both historically and at the specific time of the crime and trial, and (2) the financial means to depose trial counsel in preparation for the evidentiary hearing.

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Appendix A:
Meeks v. State,(Fla.S.Ct.No.59,958,June 17, 1982)

Appendix B:
Meeks v. Florida,382 So.2d 673(Fla.1980).

Appendix C:
Motion For Post-Conviction Relief
Supplement to Motion For Post-Conviction Relief
Statement of Judicial Acts to be Reviewed

Appendix D:
Fla. Stat. §921.141

Appendix E:
Written Findings Upon Which Sentence of Death Is Based

Criminal Law—Post-Conviction Relief—Ineffective Assistance of Counsel—Denial of Relief Proper Where Defendant Fails to Show Specific Serious Deficiency Substantial Enough to Prejudice Defendant and Affect Outcome of Trial

Reh. Denied 9-13-82

DOUGLAS RAY MEEKS v. STATE. Supreme Court of Florida. Case No. 59,958. June 17, 1982. An appeal from the Circuit Court in and for Taylor County, Spence, Judge. Stephen D. Stitt and June Rice, Gainesville, Florida, for appellant. Jim Smith, Attorney General, and Wallace E. Allbritton, Assistant Attorney General, Tallahassee, Florida, for appellee.

(PER CURIAM.) This is an appeal from a denial, after evidentiary hearing, of appellant's post-conviction relief motion under Florida Rule of Criminal Procedure 3.850, asserting ineffective assistance of trial counsel. Appellant was convicted of a convenience store armed robbery, at which he and an accomplice forced a store clerk and customer to lie on the floor. Appellant then fired five execution-type shots, killing the customer but, fortunately, only wounding the clerk, who later testified that appellant was the one with the gun.

This is the fourth occasion that this case has appeared before this Court. The initial trial, in March, 1975, was one of the first death cases tried under the newly approved death sentence procedures. We have detailed the facts of this case in our three prior reviews. In Meeks v. State, 339 So.2d 186 (Fla. 1976), cert. denied, 439 U.S. 991 (1978), we reviewed appellant's trial on the merits and affirmed his conviction and sentence of death. In Meeks v. State, 364 So.2d 461 (Fla. 1978), this Court reaffirmed the imposition of the death sentence, after a remand for resentencing in order to comply with the dictates of Gardner v. Florida, 430 U.S. 339 (1977). The Gardner violation was discovered after the original opinion issued. In Meeks v. State, 382 So.2d 673 (Fla. 1980), we found the allegations contained in that part of appellant's 3.850 motion relating to ineffective assistance of counsel required an evidentiary hearing, and we remanded for that purpose. It is the review of that proceeding which is now before us.*

Appellant contends that his trial counsel was ineffective, claiming (1) that counsel conducted inadequate jury voir dire and failed to seek and obtain additional peremptory challenges; (2) that counsel improperly allowed the prosecutor to present evidence relating to appellant's codefendant and failed to properly pursue a strategy of establishing the codefendant's greater culpability; and (3) that appellant's original trial counsel was unprepared for the sentencing phase of the proceeding.

The trial court, in denying the relief requested, made the following findings:

> From the vantage point of hindsight of five years, defendant, through his present counsel, assaults the conduct of his defense by his former counsel. Although told that his former counsel was present for testimony, defendant did not choose to call him to explain his conduct of the trial and appeal. The State did not call former counsel. Nor did the Court. Thus, counsel whose conduct of the trial and appeal is in question did not testify.
>
> Both defendant and the State did call attorneys to testify as expert witnesses. Opinions were expressed by them as to trial counsel's effectiveness. Defendant also made proffers as to racial attitudes in Taylor County as they existed at trial time and at the present as well as concerning defendant's background. Upon consideration, the court finds that the greater weight of the evidence does not support defendant's contention that he did not receive reasonably effective assistance of counsel.
>
> Tactics and strategy of counsel at trial, just as tactics and strategy of counsel at the instant evidentiary hearing, are areas that the trial judge could frequently be tempted to question. The court attempts to refrain from doing so lest it usurp counsel's role.
>
> Upon consideration of the evidence, the court finds that defendant received reasonably effective assistance of counsel at trial and upon appeal based upon the totality of the circumstances of these cases.

We affirm the ruling of the trial judge.

With reference to the asserted criticisms of trial counsel's conduct at jury selection, it must be recognized that the methods of jury voir dire are subjective and individualistic. Many experienced trial lawyers have a strong belief in short voir dire examinations. Conversely, others conduct as extensive an examination as the trial judge will allow. The views of what constitutes the best tactical approach are divergent, and the manner of the examination varies from community to community. What might be appropriate in Palm Beach or Fort Lauderdale may be unacceptable in Pensacola or Marianna. We find this record does not establish any identifiable deficiencies in appellant's trial counsel's voir dire examination, nor do we find his asserted failure to ask for additional peremptory challenges an erroneous omission by counsel necessitating a conclusion of ineffectiveness.

We also reject the second contention that appellant's trial counsel was deficient by allowing evidence of the codefendant's participation in the crime. It clearly appears that defense counsel attempted to make the codefendant the more dominant participant. In fact, appellant's next assertion of deficiency is that defense counsel did not do enough to establish the dominance of his codefendant, both in the trial on the merits and in the penalty phase. This argument, to be valid, must as a predicate establish the codefendant as the undisputed dominant individual. That fact has not been established in the instant case. We recognize that the dominant individual in a multi-party murder constitutes an important element, particularly where one participant receives the death sentence and the other, as in the instant case, receives only a life sentence. However, we have examined the total record in this cause and conclude that it reflects the codefendant was not the dominant force. We conclude that appellant's trial counsel provided reasonably effective assistance of counsel under the instant circumstances.

We reject the third assertion that defense counsel did not properly represent appellant in the sentencing phase of these proceedings. Appellant argues that trial counsel six years ago should have known what the law would be at this time. This is clearly without merit. See Parker v. North Carolina, 397 U.S. 790 (1970); Knight v. State, 394 So.2d 997 (Fla. 1981).

We find that appellant has failed to show that the asserted deficiencies of his trial counsel meet the requirements set forth in Knight v. State. As we said in Knight, "the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." Id. at 1001. This, appellant has not done. The trial judge properly denied the motion for post-conviction relief, and we, accordingly, affirm. It is so ordered.

(Sundberg, C.J., Adkins, Boyd, Overton, Alderman & McDonald, JJ., Concur.)

*This decision should not be confused with Meeks v. State, 336 So.2d 1142 (Fla. 1976), which concerns a review of an entirely independent murder conviction and sentence of death.

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Appendix B

Supreme Court of Florida

No. 58,618

DOUGLAS RAY MEEKS, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[March 20, 1980]

PER CURIAM

This is an appeal from an order denying Douglas Meeks' motions for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Appellant requested an evidentiary hearing on his motions and a stay of execution pending disposition thereof. Having reviewed the record and having heard oral argument, we concluded that appellant was entitled to a stay of execution pending disposition of this appeal. The stay of execution was entered on February 11, 1980, after oral argument on that date.

Appellant has been convicted of first-degree murder and sentenced to death on two separate occasions. On March 12, 1975, appellant was convicted and sentenced to death for the murder of Lloyd Walker (lower court No. 74-299 CF). This Court affirmed the conviction and sentence on October 28, 1976, reported at 339 So.2d 186 (Fla. 1976). On May 6, 1977, we issued a Gardner[1] order directing the trial judge to state whether his sentence was based on any information not known to appellant. On May 18, 1977, the judge responded that he had relied in part on a psychiatric report which had not been furnished to appellant. This

1. Gardner v. Florida, 430 U.S. 349 (1977).

Court remanded the cause to the trial court for an evidentiary hearing on the issue, at which time it was learned that appellant's trial counsel had been present during the examination upon which the report was based. Appellant was afforded an opportunity to rebut the contents of the psychiatric report, but his testimony at the hearing only confirmed the report's accuracy. On November 2, 1978, we reaffirmed the death sentence, 364 So.2d 461 (Fla. 1978). Appellant sought review of his original conviction and sentence as well as the Gardner proceeding by petition for writ of certiorari to the United States Supreme Court, which was denied, 439 U.S. 991 (1978).

On June 4, 1975, appellant was convicted and sentenced to death for the murder of Chevis Thompson (lower court No. 74-300 CF). We affirmed the conviction and sentence on July 21, 1976, 336 So.2d 1142 (Fla. 1976). In response to this Court's Gardner order of May 6, 1977, the trial judge stated that his sentence had been based exclusively on information known to appellant. On January 11, 1979, we issued an order declaring this case final.

Appellant filed motions for post-conviction relief pursuant to rule 3.850 of the Florida Rules of Criminal Procedure on December 11, 1979 (directed to case No. 74-299), and on December 31, 1979 (directed to case No. 74-300). On January 31, 1980, a hearing was held in the trial court to determine whether an evidentiary hearing should be granted.[2] The trial judge denied the motion for

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2. Rule 3.850 provides in pertinent part:

> If the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when such denial is not predicated upon the legal insufficiency of the motion on its face, a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to the order. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not

evidentiary hearing. A second hearing was held on February 5, 1980, to determine whether a stay of execution should be granted and whether appellant was entitled to the relief requested in his rule 3.850 motions. Pro forma orders denying relief were filed on February 5, 1980. In an amended order dated February 8, 1980, the trial judge denied appellant's motion for post-conviction relief in case No. 74-299.

Appellant alleges the following six grounds for relief in his rule 3.850 motion with respect to his murder conviction in case No. 74-299 CF: (1) that court-appointed counsel did not render effective assistance of counsel at trial, at the sentence hearing, or on appeal; (2) that defendant's death sentence was imposed in violation of the sixth, eighth and fourteenth amendments to the United States Constitution because it was imposed upon the recommendation of a jury that was not required to be unanimous; (3) that the jury was selected through procedures that systematically excluded from jury service persons having scruples against the death penalty in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968); (4) that defendant's death sentence violates the equal protection clause of the state and federal constitutions because it was imposed pursuant to a pattern and practice of racial discrimination in capital sentencing; (5) that there was no evidence of premeditation in the charge of murder and that, therefore, defendant could not be convicted of felony-murder and the underlying felony upon which the murder conviction was based; and (6) that defendant is entitled to a resentencing hearing on his first-degree murder conviction because

---

2. (continued)

authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate.

statutory mandates were not followed and the prosecutor was allowed to make improper argument to the jury in contravention of due process of law. Except for ground 5, appellant alleges the same grounds for relief with respect to his murder conviction in case No. 74-300 CF and, in addition, alleges (6) that the defendant is entitled to a new trial because the prosecutor was allowed to make improper and inflammatory comments at closing argument; (7) that the sentencing judge's use of a court-ordered psychiatric examination violated defendant's rights under the fifth, sixth, eighth and fourteenth amendments to the Constitution because defendant abandoned his insanity defense before trial; and (8) that defendant's death sentence is unconstitutional as applied under the eighth and fourteenth amendments to the Constitution because it is part of a wanton and freakish pattern of imposition in the State of Florida. All except two of the foregoing issues were or could have been raised on direct appeal and therefore are foreclosed in this proceeding for collateral review. Adams v. State, No. 58,576 (Fla. Feb. 8, 1980). Henry v. State, 377 So.2d 692 (Fla. 1979); Sullivan v. State, 372 So.2d 938 (Fla. 1979). The two grounds cognizable for collateral attack here are the allegations of ineffective assistance of counsel and racial discrimination in capital sentencing (grounds 1 and 4 in both rule 3.850 motions).

In support of ground 1, appellant cites a number of specific instances in which counsel's failure to act allegedly amounted to ineffective assistance of counsel at the trial, sentencing and appeal stages of both proceedings. Predicated on these specific allegations, appellant contends that counsel's overall performance demonstrates that appellant was given only pro forma representation. We note first of all that a conviction is presumed to be valid. Therefore, when ineffective assistance of counsel is asserted, the burden is on the person seeking collateral relief to specifically allege and establish the grounds for relief and to establish whether these grounds resulted in prejudice to that person. Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied, 411 U.S. 987 (1973).

Second, the appropriate test to be applied in determining whether defendant was afforded effective assistance of counsel is not "sham and mockery," but whether counsel was reasonably likely to render and did render reasonably effective counsel based on the totality of the circumstances. United States v. Gray, 565 F.2d 881 (5th Cir.), cert. denied, 435 U.S. 955 (1978). This does not mean, however, that defendant must be afforded errorless counsel or that counsel will be judged ineffective by a standard based on hindsight. United States v. Fessell, 531 F.2d 1275 (5th Cir. 1976). Nor does this standard mean that counsel is to be judged ineffective by virtue of his failure to anticipate future developments in the law. Parker v. North Carolina, 397 U.S. 790 (1970); Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977).

Pursuant to a rule 3.850 motion, a prisoner is entitled to an evidentiary hearing unless the motion and the files and records in the case conclusively show that he is entitled to no relief. If the prisoner raises a matter that may properly be considered in a rule 3.850 motion, the trial judge reviewing the motion must either attach that portion of the case file or record which conclusively shows that the prisoner is entitled to no relief or grant an evidentiary hearing. Gunn v. State, No. 78-211/T4-51 (Fla. 5th DCA Jan. 2, 1980); Giles v. State, 363 So.2d 164 (Fla. 3d DCA 1978); Payne v. State, 362 So.2d 688 (Fla. 2d DCA 1978). Based on our review of the record presented to this Court, we cannot say that appellant's specific allegations of ineffective assistance of counsel, considered collectively, conclusively show a lack of merit so as to obviate the need for an evidentiary hearing into the matter.

With regard to ground 4, the Court is not persuaded that appellant is entitled to an evidentiary hearing respecting his contention that Florida's death penalty statute is imposed in an unconstitutionally discriminatory fashion.

Accordingly, to the extent that the trial court's orders and amended order deny relief under rule 3.850 with respect to the ground of ineffective assistance of counsel, they are hereby reversed. The orders are in all other respects affirmed. This

case is remanded to the trial court for a prompt evidentiary hearing on the question of ineffective assistance of counsel. The stay of execution previously granted by this Court on February 11, 1980, is dissolved.

It is so ordered.

ENGLAND, C.J., OVERTON, SUNDBERG, ALDERMAN and McDONALD, JJ., Concur
OVERTON, J., Concurs specially with an opinion, with which ALDERMAN and McDONALD, JJ., Concur
SUNDBERG, J., Concurs specially with an opinion, with which ENGLAND, C.J., Concurs
ADKINS, J., Dissents with an opinion, with which BOYD, J., Concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., specially concurring.

I would totally reject the contention of the movant-appellant that a victim-oriented statistical factual basis may be submitted within the purview of Henry v. State, 377 So. 2d 692 (Fla. 1979), to show that Florida's death penalty statute is imposed in an unconstitutional and discriminatory manner.

The appellant's statistical allegations are based entirely on the race of the victim rather than the race of the offender. To try to statistically correlate offenders' race with the race of their victims results in a mathematical nightmare which has no bearing on the actual conduct of the offender as the determining factor of who lives and who dies. We are obligated to review each case upon its facts and circumstances and determine whether or not the conduct of the offender justifies the imposition of the death penalty.

The appellant's own statistical allegations clearly establish that this black appellant has not been prejudiced. The figures specifically reflect that of the 2,606 homicides committed by blacks, fifty-nine have resulted in the death penalty. On the other hand, of the 2,256 homicides committed by whites, seventy-two have resulted in the death penalty. These statistics reflect no disparity or discrimination. In my view, the statistical information submitted by appellant in this cause is similar to that rejected by the Fifth Circuit Court of Appeals in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). There Spinkellink submitted statistical evidence which reflected that "92 percent of the inmates on Florida death row had murdered white victims while only 8 percent had murdered black victims." [Emphasis added.] 578 F.2d at 612. This data was held to be legally insufficient to establish a prima facie showing of racial discrimination. I conclude that the instant figures similarly fail to establish a factual basis for the proposition that our death penalty statute is being applied in a discriminatory manner or is not racially neutral. See Lewis, Mannle, Allen, and Vetter, A Post-Furman Profile of Florida's Condemned--A Question of Discrimination in Terms of the Race of the Victim and a Comment on Spinkellink v. Wainwright, 9 Stetson Law Review 1 (1979).

ALDERMAN and McDONALD, JJ., Concur

SUNDBERG, J., concurring specially.

While I concur in the Court's opinion and judgment in this case, I deem it appropriate to express the reason for my concurrence in the conclusion that appellant is not entitled to an evidentiary hearing regarding his contention that Florida's death penalty statute is imposed in an unconstitutionally discriminatory fashion. The reason is that I do not believe appellant has made a sufficient preliminary showing to require such a hearing. Counsel for appellant urges us to adopt the test enunciated in Castaneda v. Partida, 430 U.S. 482 (1977), as a guide in determining whether our statute has been unevenly applied. Pursuant to that test it would be appellant's task to show: (1) a marked statistical disparity over a significant period of time in the way the death penalty is imposed upon black and white capital defendants, and (2) that the capital sentencing procedure in Florida is susceptible of abuse or not racially neutral. If appellant introduced competent evidence in support of these two elements, he would have made a prima facie showing of discriminatory application of the death penalty, and the burden would then shift to the state to rebut appellant's case. Id. at 494-95. See Rose v. Mitchell, ___ U.S. ____, 99 S. Ct. 2993, ___ L.Ed.2d ____ (1979); Washington v. Davis, 426 U.S. 229 (1976). Assuming, without deciding, that the Castaneda test is an appropriate analytical tool in this case,* appellant has failed, even on a preliminary basis so as to justify an evidentiary hearing, to present a sufficiently compelling statistical showing over a significant period of time that Florida's death penalty statute has been unconstitutionally applied. I would note incidentally that appellant's statistical data is victim-oriented; there has been no showing of disproportionate black representation of those now residing on death row as a result of the operation of our capital sentencing statute, section 921.141, Florida Statutes (1979).

ENGLAND, C.J., Concurs

* Indeed, that the Castaneda analysis is appropriate in the context of an equal protection challenge to Florida's death penalty statute is not without some doubt. See Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).

ADKINS, J., Dissenting.

The motion, the files, and the records in the case conclusively show that defendant is not entitled to relief. The trial judge properly denied an evidentiary hearing.

After meticulously picking through the record, appellate counsel has differed with the judgment of trial counsel in the manner in which certain portions of the trial were conducted. Therefore appellate counsel says trial counsel should be placed upon trial before the trial judge. The trial judge has carefully considered contentions of appellate counsel and decided that trial counsel rendered reasonably effective counsel based on a totality of the circumstances. The record disclosed this on its face, so the trial judge denied the motion. Appellate counsel now complains to us, saying the trial judge committed error. We have examined this record twice in the past, and our decision was not disturbed by the United States Supreme Court. The majority has been led into a quagmire of confusion and decided that still another hearing should be held.

Using general terms and without setting forth specific guidelines, the majority is telling the trial judge to try trial counsel. Even a defendant in a criminal case requires a more definite specification of charges before he is required to answer.

The guilt of the defendant is firmly established by the evidence. The trial judge justified his sentence of death in writing and provided this Court the opportunity for a meaningful review. We determined that the trial judge viewed the issue of life or death within the framework of the rules provided by statute. The Supreme Court of the United States agreed with us.

As stated in State v. Dixon, 283 So.2d 1 (Fla. 1973), discrimination or capriciousness cannot stand where reason is required. This was an aggravated and indefensible crime. The alleged statistics gathered by appellate counsel do not change the nature of this crime nor do they have any bearing on whether this particular defendant should or should not receive capital punishment.

The citizens of our state, speaking through the legislature, have determined that capital punishment should be inflicted in

certain instances. The Supreme Court of the United States has held that our form of procedure is constitutional. This Court has followed the guidelines set forth by the legislature and approved by the United States Supreme Court. If we continue to create new procedures, and cause more delays, the deterrence of capital punishment will be ineffective.

To be successful in his contention, the defendant would be required to show that the procedure under which a person is selected for a death sentence is susceptible to abuse or not racially neutral. Unless there is a scheme or conspiracy among the twenty state attorneys in Florida to seek death penalties primarily when a white victim has been murdered, then race-of-the-victim argument must fail under its own weight. Also, the imposition of the death penalty ultimately requires the concurrence of the trial judge, the Florida Supreme Court, and the Governor's Executive Clemency Board. To be successful, the defendant must show that all of these officers participated in intentional or purposeful discrimination. As stated in "A Post-Furman Profile of Florida's Condemned, etc.," by Lewis, Mannle, Allen and Vetter, 9 Stetson Law Review 1 (Fall 1979), "it is thus unlikely that any defendant will be able to establish a prima facie case of purposeful discrimination based on a 'race-of-the-victim' hypothesis."

Our system guards against discrimination in terms of the race of the victim and is not subject to attack on that basis.

Our responsibility is a tremendous one in capital cases. However, this defendant has received a fair and impartial trial, counsel was reasonably effective based on the totality of the circumstances, and there is a total absence of discrimination in the imposition of the death penalty.

In my opinion the stay order should be dissolved and the decision of the trial judge should be affirmed.

BOYD, J., Concurs

An Appeal from the Circuit Court in and for Taylor County,

Royce Agner, Judge - Case Nos. 74-299-CF and 74-300-CF

Stephen D. Stitt and June Rice, Gainesville, Florida,

for Appellant

Jim Smith, Attorney General; and Wallace E. Allbritton, Assistant Attorney General, Tallahassee, Florida,

for Appellee

IN THE THIRD ... AL CIRCUIT COURT
TAYLOR COUNTY, FLORIDA

STATE OF FLORIDA :

v. : Case No. 74-299

DOUGLAS RAY MEEKS :

_____ :

MOTION FOR POST CONVICTION RELIEF

1. Name and location of the court which entered the judgment of conviction under attack: Third Judicial Circuit Court, Taylor County, Florida.

2. Date of judgment of conviction: March 12, 1975

3. Length of sentence: Count I, Death; Count II, Life; Count III, 15 years consecutive; Count IV, 15 years consecutive.

4. Nature of offense(s) involved (all counts): Count I, Murder in the First Degree; Count II, Robbery; Count III, Assault with the Intent to Commit Murder; Count IV, Use of a Firearm in the Commission of a Felony.

5. What was your plea? (check only one)

(a) Not Guilty X
(b) Guilty _____
(c) Nolo Contendere _____
(d) Not Guilty by reason of Insanity _____

If you entered one plea to one count, and a different plea to another count, give details:

N/A

6. Kind of trial: (check only one)

(a) Jury X
(b) Judge only without jury _____

7. Did you testify at the trial or at any pre-trial hearing?

Yes _____ No X

If yes, list each such occasion:

8. Did you appeal from the judgment of conviction?

Yes X No _____

9. If you did appeal, answer the following:

(a) Name of court: Florida Supreme Court
(b) Result: affirmed conviction
(c) Date of result: October 38, 1976
(d) Citation (if known): 339 So. 2d 186

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc. with respect to this judgment in this court?

Yes _____ No X

11. If your answer to number 10 was "yes", the following information (applies only to proceedings in this court): N/A

(a) (1) Nature of the proceeding:

(2) Grounds raised:

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes_____ No_____

(4) Result:

(5) Date of result:

(b) As to any second petition, application, motion, etc. give the same information:

(1) Nature of the proceeding:

(2) Grounds raised:

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc?

Yes_____ No_____

(4) Result:

(5) Date of result:

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petition, applications, motions, etc. with respect to this judgment in any other court?

Yes X No_____

13. If your answer to number 12 was "yes", give the following information:

(a)(1) Name of court: United States Supreme Court

(2) Nature of the proceeding: Petition for Writ of Certiorari

(3) Grounds raised: (a) Whether Nondisclosure of Psychiatric report violates 6th and 14th Amendment rights; (b) Witherspoon challenges; and (c) Whether the death sentence violates 8th and 14th Amendment rights.

(4) Did you receive an evidentiary hearing on your petition, application, motions, etc?

Yes _____ No X

(5) Result: Petition denied

(6) Date of result: November 27, 1978

(b) As to any second petition, application, motion, etc. give the same information: N/A

(1) Name of Court:

(2) Nature of the proceeding:

(3) Grounds raised:

application, motion, etc.?

Yes_____ No_____

(5) Result:

(6) Date of result:

(c) As to any third petition, application, motion, etc., give the same information: N/A

(1) Name of Court:

(2) Nature of the proceeding:

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes_____ No_____

(5) Result:

(6) Date of result:

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and the facts supporting them.

For your information, the following is a list of the most frequently raised grounds for post-conviction relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that your conviction or sentence is unlawful.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the Court if you merely check (a) through (l).

(a) Conviction obtained by plea of guilty or nolo contendere which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected or impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial or right of appeal.

(k) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute).

(l) Sentence in excess of the maximum authorized by law.

A. Ground one: is the position of the endant/Petitioner that court appointed counsel did not render effective assistance of counsel at trial, at the sentencing hearing, or on appeal.

Supporting Facts: Please see attached Supplement to Motion for Post Conviction Relief incorporated herein by reference.

B. Ground two: Defendant's death sentence was imposed in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it was imposed upon the recommendation of a jury that was not required to be unanimous.

Supporting Facts: Please see attached Supplement to Motion for Post Conviction Relief incorporated herein by reference.

C. Ground three: Defendant's death sentence was imposed pursuant to a recommendation of a jury selected through procedures that systematically excluded from jury service persons having scruples against the death penalty, in violation of Witherspoon v. Illinois.

Supporting Facts: Please see attached Supplement to Motion for Post Conviction Relief incorporated herein by reference.

D. Ground four: Defendant's death sentence violates the Equal Protection clause of state and federal constitutions because it was imposed pursuant to a pattern and practice of racial discrimination in capital sentencing.

Supporting Facts: Please see attached Supplement to Motion for Post Conviction Relief incorporated herein by reference.

E. Ground five: Defendant's sentence of life imprisonment on the conviction of robbery should be vacated because there was no evidence of premeditation in the charge of murder. Therefore, the Defendant could not be convicted of felony-murder and the underlying felony upon which the murder conviction was based.

Supporting Facts: Please see attached Supplement to Motion for Post Conviction Relief incorporated herein by reference.

F. Ground six: The Defendant is entitled to a resentencing hearing on the conviction for first degree murder because statutory mandates were not followed and because the prosecutor was allowed to make improper argument to the jury. These procedures denied the Defendant due process of the law, in contravention of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Supporting Facts" Please see attached Supplement to Motion for Post Conviction Relief incorporated herein by reference.

15. If any of the grounds listed in 14A, B, C and D were not previously presented on your direct appeal, state briefly what gounds were not so presented, and give your reasons why they were not so presented:

Due to lack of effective representation at trial and on appeal, issues were not raised or preserved. There was no knowing waiver on the part of the Defendant of any of the preceding issues and failure to raise or argue issues was not grounded in strategy by counsel.

16. Do you have any petition, application, appeal, motion, etc. now pending in any court, either state or federal, as to the judgement under attack?

Yes ____ No X

17. If your answer to number 16 was "yes", give the following information: N/A

(a) Name of Court:
(b) Nature of the Proceedings:
(c) Grounds raised:
(d) Status of the proceedings:

18. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein.

(a) At preliminary hearing: -

(b) At arraignment and plea:

(c) At trial: Mr. John Howard, Cross City, Florida

(d) At sentencing: Mr. John Howard, Cross City, Florida

(e) On appeal: Mr. John Howard, Cross City, Florida

(f) In any post-conviction proceeding: On Petition for Writ of Certiorari to the United States Supreme Court: David Kendall, Jack Greenberg, James Nabritt III, Joel Berger, N.A.A.C.P. Legal Defense Fund, New York, and Anthony G. Amsterdam, Stanford, California.

(g) On appeal from any adverse ruling in a post-conviction proceeding:

WHEREFORE, Movant prays that the Court grant all relief to which he may be entitled in this proceeding, including but not limited to (here list the nature of the relief sought):

1. Vacation of judgment and sentence and new trial, and
2. Such other and further relief as the Court deems just and proper.

STATE OF FLORIDA
COUNTY OF Leon

Before me, the undersigned authority, this day personally appeared June Rice who first being duly sworn, says that she is counsel for the Defendant in the above-styled cause, that she has read the foregoing Motion for Post-Conviction Relief and has knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct to the best of her knowledge.

June Rice
June Rice

SWORN AND SUBSCRIBED TO
before me this 11th
day of December, 1979.

Cynthia J. Jackson
NOTARY PUBLIC
COMMISSION EXPIRES
3/7/82

A. Ground One Supporting Facts:

1. Ineffective Assistance at Trial.

a. Although defense counsel originally filed a plea of Not Guilty by Reason of Insanity, counsel later withdrew that plea and did nothing further to explore theories of diminished responsibility or prior mental health problems.

Counsel was present during a psychiatric examination of the Defendant but it does not appear from the report or anywhere on the record that the Defendant was advised that statements made to the psychiatrist would be used against him. The majority of the report amounts to nothing more than a confession with very little comment on the issues of competency or insanity. The record does not reflect any advice on counsel's part as to the Defendant's Fifth Amendment rights against self-incrimination.

b. There was no motion for change of venue or in the alternative any effective voir dire questioning by counsel concerning publicity and/or knowledge of the case. Almost all of the prospective jurors admitted they had some knowledge of the case, either from reading about it in the newspaper, hearing about it on the radio, or hearing gossip or "street talk" about it. Several jurors were acquainted with various critical parties in the case, including the victim, the co-defendant, the defendant and several witnesses.

It appears from the record that two separate murder trials for the Defendant were scheduled back-to-back. There were no voir dire questions that explored knowledge of the fact that there was another murder charge or whether jurors had information concerning the other charge. Only pro forma questions were asked and there was no attempt to probe into prejudicial areas in camera. Because of the size of the town and the notoriety of the cases, counsel's failure to effectively voir dire prospective jurors denied the Defendant a fair and impartial jury. Counsel failed to establish a record reflecting the

prejudice that is highly likely to exist in such a situation. No effort was made to determine the content of the "gossip" and "street talk" the prospective jurors were exposed to.

c. Counsel failed to establish a record concerning possible jury selection violations, both in the grand and petit juries. Counsel did not question prospective jurors about possible race prejudice, even though the Defendant was Black and the victims white. The record does not reflect whether there were members of the Defendant's race in the grand jury pool, the petit jury pool, or on the jury itself.

d. Counsel failed to build a record concerning possible Witherspoon challenges. The trial transcript contains numerous notations of "inaudible" and it is impossible to tell from the transcript which juror answered questions in what manner and which jurors were excused as a result. Defense counsel made no effort to make sure that the prospective jurors understood their legal duty to subordinate their scruples and apply the law as instructed by the judge. Counsel's failure to rehabilitate prospective jurors or to make sure they understood the issue served to deny the Defendant any possibility of representation on the jury of persons with scruples against the death penalty. Please see Ground Three for additional supporting facts.

2. Ineffective Assistance at the Sentencing Phase.

It is clear from the record that there was literally no preparation by counsel for the sentencing phase of the trial. The jury returned a verdict of guilty to all counts of the indictment at 4:52 p.m. Defense counsel did not request a continuance to prepare for argument or the presentation of mitigating circumstances. The sentencing phase began at 5:05 p.m.and the only witness called was the Taylor County clerk of the court. Defense counsel, by asking the clerk about pending cases in other counties, opened the door for the prosecutor to ask on cross examination about other pending charges in Taylor County. The jury was therefore allowed to hear information that was highly prejudicial to the Defendant and which was a non-statutory aggravating circumstance.

the jury in this life or death recommendation was a few seconds of argument which did not touch on any of the statutory mitigating circumstances. Nor did defense counsel rebut any of the inaccurate or inappropriate argument made by the state attorney. Please see Ground Six for additional supporting facts.

3. Ineffective Assistance on Appeal. The court-appointed trial counsel was designated by the trial judge to represent the Defendant on appeal. Although counsel raised seven points on appeal, the brief filed by counsel contained less than six pages of argument. One of the points raised on appeal was specifically waived by counsel at trial, that of polling the jury regarding their sentencing recommendation. Because of counsel's failure to raise and preserve possible points of appeal at the trial stage, counsel prevented the Defendant from having a full review of his death sentence as mandated by the Florida Supreme Court and the United States Supreme Court.

B. Ground Two Supporting Facts:

Florida Statutes 921.141(3) provides that the jury recommendation of sentence shall be by majority vote.

C. Ground Three Supporting Facts:

Witherspoon forbids the allowance of a challenge for cause to a venireman unless that venireman has first been instructed by the trial judge that he has a legal duty to subordinate his scruples to his obligation to sit as a juror and to follow the law if he possibly can. Unless the venireman, after such instruction, makes it unmistakably clear that he is unable to consider the application of the death penalty in any case, he cannot be excused for cause.

Two jurors were excused for cause without such instruction by the judge; Mrs. Tumlin (p. 56 of the trial transcript) and Mrs. Hale (p. 82 of the trial transcript). Defense counsel did not object to the challenges for cause and also failed to determine whether the juror understood the issue and would

follow the law as instructed. In the case of Mrs. Tumlin, she at one point stated she would be able to reach a verdict in spite of her opposition to the death penalty. In the case of Mrs. Hale, it is impossible to tell whether the challenge for cause was appropriate because the record only reflects that her responses to questions concerning her ability to reach a verdict were inaudible.

D. Ground Four Supporting Facts:

The death penalty has been imposed against the Defendant in violation of his constitutional rights under the Eighth, and Fourteenth Amendments in that the penalty improperly discriminates against black people and in favor of white people. On information and belief, the Defendant avers, and requests a hearing at which he may prove, that fifty percent of Florida's murder victims are white, yet their killers comprise 95 percent of the state's death row. The death penalty in Florida is far more likely to be imposed in "black on white" homicide cases than in those similar circumstances but involving a different racial mixture.

E. Ground Five Supporting Facts:

The state attorney made it clear to prospective jurors on voir dire and to the jury in opening statement and closing argument that he did not have to prove premeditation in order for the jury to convict the Defendant of first degree murder. No evidence was presented at trial or during the penalty phase that the murder was committed with premeditation. The court in Pinder v. State, 336 So. 2d 38 (3DCA 1978), held that where a jury could have found the Defendant guilty of first-degree murder only on the basis of evidence that he killed the victim during the perpretration of an itemized felony, and without evidence of premeditation, there could not be a sentence for the underlying felony as well as for the first degree murder.

F. Ground Six Supporting Facts:

At the sentencing phase of the trial, the jury was permitted to hear evidence that the Defendant had another pending charge in Taylor County. This is an impermissable non-statutory

aggravating circumstance. The jury also heard argument from the prosecutor that was inaccurate and inappropriate. Specifically, the state attorney argued that the fact that the Defendant did not have a prior or significant history of prior criminal activities should not be any kind of mitigating circumstance (p. 423 of the trial transcript), directly contrary to the statute. The prosecutor argued that the Defendant was in his mid-twenties when in fact he was only 21. This coupled with the Defendant's low I.Q. was ultimately determined to be a mitigating factor by the trial judge, but it is impossible to tell whether the jury considered any mitigating factors due to the prosecutor's erroneous arguments and defense counsel's failure to argue mitigation. The prosecutor also argued that the fact that the Defendant was convicted on four counts should be considered in aggravation, another impermissable non-statutory aggravating circumstance.

The prosecutor doubled up on factors involving pecuniary gain (both the underlying felony of robbery and for pecuniary gain) determined to be impermissable under subsequent case law. The prosecutor failed to inform the jury that a capital life sentence involves 25 years mandatory without parole and instead misled the jury by saying that if they recommended life, the Defendant would receive no greater sentence than he could receive for the robbery. The argument that "to recommend life imprisonment is to turn him loose with murder" was inaccurate and inflammatory. Because the prosecutor argued impermissable non-statutory aggravating circumstances and seriously misled the jury in several other regards, the Defendant should receive a new sentencing hearing.

It is impossible to conclude that the advisory jury gave full and fair consideration to their decision in light of the unlawful and inaccurate argument by the prosecutor, the failure of defense counsel to rebut or offer mitigation, the brevity with which the issues were considered after a long and difficult day. The sentencing phase was conducted immediately after two full days of trial, beginning at 5:05 p.m. The jury retired to

deliberate at 5:40 , returning a death recommendation at 6:03. That same day the trial judge sentenced the Defendant to death. It is inconceivable that this sentence could have resulted from the careful deliberation warranted by such a grave decision without any presentation of mitigation on the part of defense counsel, without the benefit of a pre-sentence investigation report, and upon the recommendation of a tired jury exposed to non-statutory aggravating circumstances and improper argument by the prosecutor. A sentence of death is far too serious to be arrived at so summarily.

IN THE THIRD JUDICIAL CIRCUIT
COURT, TAYLOR COUNTY, FLORIDA

STATE OF FLORIDA,

vs. Case No. 74-299-CF

DOUGLAS RAY MEEKS.

SUPPLEMENT TO MOTION FOR POST CONVICTION RELIEF

G. GROUND SIX: The Petitioner is entitled to be resentenced without the consideration of a psychiatric report which was provided to the Court after a court-ordered psychiatric examination held to determine Petitioner's sanity at the time of the crime and competency to stand trial. The use of the psychiatric report violated Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
Supporting Facts: The psychiatric report provided by Dr. Carrera was used as a sentencing tool by the judge in both cases against the Petitioner. In 74-299, the judge quoted extensively from the report in his written findings supporting the death sentence. There is no question but that the report worked to disadvantage Petitioner and that he had abandoned any claim to the defense of insanity before the consideration of the report in sentencing. Petitioner submits that the exploration of insanity as a defense by an indigent person does not open the door for the judge to rely on specific information prejudicail to Petitioner when such information was gained from confidential reports of court-ordered psychiatrists.

H. GROUND SEVEN: Petitioner's death sentence is unconstitutional as applied under the Eighth and Fourteenth Amendments to the United States Constitution because it is part of a wanton and freakish pattern of imposition in the State of Florida.
Supporting Facts: Although the facial constitutionality of Florida's 1972 death penalty statute has been upheld, the death penalty has since been administered and applied under the statute in a manner

which is inconsistent with the premises of State v. Dixon, 283 So. 2d 1 (Fla. 1973) and Profitt v. Florida, 428 U.S. 242 (1976). Death sentences are imposed irregularly, unpredictably and whimsically in cases which are no more deserving of capital punishment, under a standard that considers the character of the offender and the offense, than many other cases in which sentences of imprisonment are imposed.

I. GROUND EIGHT: Prejudicial error was committed by the trial court, when during jury deliberation, a question was presented by the jury which was answered with information not in evidence and which made inferences concerning the Petitioner's failure to testify in his own behalf, thereby constituting an improper comment on Petitioner's right to remain silent as provided by the Fifth Amendment to the United States Constitution.

Supporting Facts: The jury asked the following question:

> "JUROR: Yes, Your Honor, the question has come over and over in our discussion, why Mr. Hardwick was not a witness in any way relating to the case."
>
> (T-299, p. 391)

The Court answered in the following way:

> "COURT: Court is in order. Members of the Jury, Homer Lee Hardwick, Jr., is under an Indictment charging him with crimes arising out of the same transaction as that which this trial is concerned and therefore he cannot be compelled to testify."
>
> (T-299,p. 395)

This answer was outside the evidence presented in the case and inferred not only that if Mr. Hardwick were required to testify that he might incriminate himself, it also implied that Mr. Hardwick's testimony would incriminate the Petitioner. It is also an implication that failing to testify results from an unwillingness to incriminate oneself.

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplement to Motion for Post Conviction Relief, in Case No. 74-299, has been furnished to the Office of the State Attorney, Third Judicial Circuit Court, P. O. Drawer 1546, Lake City, Florida, 32055, by first-class mail, this 16th day of January, 1980.

June Rice

Judy Rice

Stephen D. Stitt

ATTORNEYS FOR PETITIONER

IN THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT, IN AND
FOR TAYLOR COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

vs. Case No. 74-299-CF

DOUGLAS RAY MEEKS,

Defendant.

STATEMENT OF JUDICIAL ACTS TO BE REVIEWED

COMES NOW the Defendant, Douglas Ray Meeks, by and through undersigned counsel and respectfully files his Statement of Judicial Acts to be Reviewed, pursuant to Rule 9.140(d), Florida Appellate Rules, and intended to be relied upon in the Florida Supreme Court, and states the following:

1. The Trial Court erred in failing to admit as evidence proffered testimony regarding the racial atmosphere existing in Perry, Florida, at and around the time of the trial, which was relevant to the issue of trial counsel's ineffective representation.

2. The Trial Court erred in failing to admit as evidence the testimony of a witness proffered to show mitigating circumstances which should have been presented at the penalty phase of the trial.

3. The Trial Court erred in denying Defendant's Motion for Costs for Experts who would have offered testimony in mitigation at the sentencing phase, and for experts who would testify regarding the prevalence of racial bias in the community from which the jury was drawn.

4. The Trial Court erred in denying Defendant's Motion for Transciption of the voir dire examination in the co-defendant's case as evidence relating to community attitudes and racial atmosphere relevant to trial counsel's ineffectiveness.

5. The Trial Court erred in denying Defendant's Motion for Prior Authorization of Costs reasonably necessary to the preparation of Defendant's case.

6. The Trial Court erred in denying Defendant's motion for a copy of the transcripts in the co-defendant's case as evidence relating to trial counsel's ineffectiveness.

7. The Trial Court erred in holding that under the totality of circumstances, the Defendant received reasonably effective assistance of counsel at trial, at sentencing, and on appeal.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Office of the State Attorney, Third Judicial Circuit, Taylor County, Florida, this 20th day of November, 1980, by first class mail.

Respectfully Submitted,

Stephen D. Stitt

Stephen D. Stitt
Holland Law Center
University of Florida
Gainesville, Florida 32611

June Rice

June Rice
3915 S. W. 18th Street
Gainesville, Florida 32608

ATTORNEYS FOR DEFENDANT

APPENDIX D

Fla. Stat. §921.141 **SENTENCE OF DEATH OR LIFE IMPRISONMENT FOR CAPITAL FELONIES; FURTHER PROCEEDINGS TO DETERMINE SENTENCE**

(1) Separate proceedings on issue of penalty. -- Upon conviction or adjudication of guilt of a defendant in a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death. -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence. -- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances. -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances. -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

APPENDIX B

IN THE CIRCUIT COURT, THIRD JUDICIAL CIRCUIT, IN AND FOR TAYLOR COUNTY, FLORIDA.

CRIMINAL CASE NO: 74-299-CF

STATE OF FLORIDA, :
VS. :
DOUGLAS RAY MEEKS, :
Defendant. :

FILED IN OFFICE THIS
JUN 4 1975
CHARLES RALPH CARLTON
CLERK CIRCUIT COURT
TAYLOR COUNTY, FLORIDA
BY Charles Carlton
CLERK

WRITTEN FINDINGS UPON WHICH SENTENCE OF DEATH IS BASED

On March 12, 1975, in the Taylor County Courtroom at Perry, Florida, the defendant was found guilty of murder in the first degree of the death of Lloyd Walker, of the age of sixteen (16) years under Count I of a IV-Count indictment. Under Count II, the defendant was found guilty of robbery of Diane Allen. Under Count III, the defendant was found guilty of assault upon Diane Allen with intent to commit murder in the first degree. Under Count IV, he was found guilty of the use of a firearm during the commission of robbery.

The undersigned judge heard all the evidence in this case and observed all the witnesses as they testified.

Following reception of the jury's verdict finding guilt of murder in the first degree, a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment was held. In this proceeding, the State rested upon the evidence previously introduced during the trial as to guilt. The defendant called the clerk in custody of the Taylor County Sheriff's records as his sole witness. In response to defense counsel's questions, she testified that

there were no charges pending against the defendant in any other county. Over defense counsel's objections, she testified that there was an additional charge of murder pending against the defendant in this county.

By agreement, counsel for the State and the defendant, in the order named, then made arguments to the jury for and against the death sentence.

The Court then instructed the jury as to the provisions of Fla.Stat. 921.141 and the jury retired for deliberations. It rendered an advisory sentence of death.

The death sentenced was imposed.

This Court finds that the facts of this case do not support the aggravating circumstances in Fla. Stat. 921.141(6), subsections (a),(b) and (c) in that this captial felony was not committed by a person under sentence of imprisonment nor had the defendant previously been convicted of a capital felony nor did the defendant knowingly create a great risk of death to many person.

The Court does find, as an aggravating circumstance, that the capital felony, the murder of Lloyd Walker, was committed as a part of another dangerous and violent felony, the robbery of Diane Allen at gunpoint and in flight after committing that felony, Fla.Stat. 921.141(6)(d).

The Court also finds, as an aggravating circumstance, that the capital felony was committed with the motive of avoiding and preventing arrest, was committed for pecuniary gain and to hinder the enforcement of laws. Fla. Stat. 921.141 (6)(e)(f)(g).

The uncontroverted testimony of Diane Allen at the trial was that she was on duty as a clerk in a Junior Food Store in Perry, Florida, at approximately 8:00 o'clock p.m. on November 6, 1974, a Wednesday. She was behind the counter to the left of the cash register. Lloyd Walker, sixteen (16), was

the only other person in the store. He was standing slightly to her right and in front of the counter. Two men entered the store. The taller of the two, the accomplice not on trial, grabbed Lloyd Walker around his neck from behind with such force as to almost lift him from the floor and the second, the defendant, held a small revolver on Diane Allen and told her to give him the money which she did. It amounted to about $35.00. The defendant then told Diane Allen and Lloyd Walker to go to the back. They did go to a small room in the rear of the store where soft drink bottles were kept. They were ordered to lie down on the floor. They did lie down on their backs. Defendant Meeks still had the revolver in his hand. They were told to turn over on their stomachs. They did. Thereafter Diane Allen heard shots. About the third or fourth shot, she felt a pain or indication that she had been struck in her left upper back region. She heard another shot or so, then heard the bell on the door to the store ring.

She then got up and came to the front area of the store. The defendant Meeks and his accomplice were nowhere to be seen. She returned to the rear area of the store where Lloyd Walker was lying and called to him.

He did not respond to her calls. He died in Tallahassee Memorial Hospital on November 12, 1974, due to transection of his spinal cord from the brainstem by bullet wound, according to the autopsy report of Doctor Thomas P. Wood, who testified at the trial. (Copy of report attached). He found the bullet to have entered the right side of the base of the neck posteriorly, to course slightly superiorly and to the left.

Turning to mitigating circumstances, the Court finds that the defendant has no prior signifcant history of criminal activity. Fla.Stat.921.141(7)(a) and therefore this fact has been considered as a mitigating circumstance.

Under Fla.Stat.921.141(7) subsections (b) and (f), the Court finds that the defendant was suffering from no extreme

mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

The defendant moved for appointment of psychiatrists to examine him "...to substantiate the insanity of the Defendant at the time of the crime and subsequently thereto...". (Prior to trial defendant's counsel moved to withdraw the motion alleging insanity). Doctors Barnard and Carrera were appointed and reported the results of their examination. Their report is devoid of any evidence of mental or emotional disturbance of the defendant. Doctor Carrera's report shows that the defendant stated that "... I just did it... after it was all over I just felt like myself... I wasn't scared or upset... no change in myself... I wasn't angry with any one that day". According to the report, the defendant had whiled away the hours of the day of the offense, attending a portion of a football game immediately prior to the offense. The psychiatrists both conclude that the defendant was sane at the time of the examination and at the time of the offense.

Doctor Carrera's report has been received and read by the undersigned but has not been filed. Insofar as the Court is now aware, it has never been seen by counsel for the State or the defendant. The report recites, however, that defense counsel was present during the psychiatric examination of the defendant which forms the basis of the report. Doctor Carrera's report includes a history taken from the defendant. In this history, the defendant told Doctor Carrera that he and his accomplice discussed robbing the store. The accomplice told the defendant that the girl in the store knew the accomplice. The accomplice also said that, if they robbed the store, he didn't want anyone talking on him, so it would be necessary for them to shoot her. According to the report, the defendant's

response was that it was all right with him and that it seemed like a good idea to shoot the store employee so that in that way nobody would recgonize them and blame them for it.

This fact has been considered under Fla.Stat.921.141 (7)(e). The Court rejects it as a mitigating circumstance and finds that Meeks was not under the duress or domination of his accomplice at the time he committed the capital felony.

On the contrary, this fact supports the finding that the capital felony was committed under the aggravating circumstances hereinabove outlined with respect to avoiding arrest and to hinder the enforcement of law.

Further, the Court finds that the victim certainly was not a participant in nor consented to the criminal conduct, Fla.Stat.921.141 (c)(e) and that the defendant, even if found to be an accomplice, did play a major part in the capital felony. Fla.Stat.921.141(7)(d). No mitigation exists under either of these subsections.

Finally, the age of the defendant has been considered as required by Fla.Stat.921.141(7)(g). The defendant is 21. The report of Doctor Barnard contained his medical judgment that the defendant was of dull-normal intelligence.

The Court finds the combination of the defendant's youthful age and his intelligence to be a mitigating factor.

The Court, in the circumstances of this case, deemed the requirement of CrPR 3.710 to be directory and not mandatory. Therefore, no pre-sentence report has been considered.

The Court and counsel throughout the conduct of this trial, and especially after determination of guilt, considered the pronouncement of the Supreme Court of Florida in Dixon v. State, 283 So2d 1.

Mindful of the language on page eight (8) of that opinion by Chief Justice Adkins, this trial judge attempted to

give thoughtful consideration to the evidence in this case as to the aggravating or mitigating circumstances. In particular, an absolute presumption of innocence has been accorded the defendant as to a pending indictment in this Court for a subsequent alleged murder in a transaction completely unrelated to this instant capital felony.

Upon consideration, it was at the time of sentencing and is now, some hours later as the sentence of death is justified in writing, the inescapable conclusion of the undersigned that sufficient aggravating circumstances exist in the facts to justify the death penalty. The murder of the victim by the defendant was for the express purpose of executing the victim to prevent his identifying the defendant, so that the defendant could flee after having committed robbery at gunpoint for pecuniary gain which robbery was witnessed by the victim and to prevent the lawful arrest of the defendant and thus this conscienceless murder was designed to hinder the enforcement of laws.

The mitigating circumstances of a young age and no prior history of criminal conduct on the part of the defendant are entirely insufficient to and do not outweigh the aggravating circumstances.

SIGNED this March 17, 1975.

Royce Agner

ROYCE AGNER, CIRCUIT JUDGE

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82-5744

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-

DOUGLAS RAY MEEKS,

Petitioner,

-v-

LOUIE L. WAINWRIGHT,

Respondent.

FIRST SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida of which petitioner here seeks review has been published in Volume 418 So.2d at page 987 (Fla. 1982) (rehearing denied September 13, 1982).

STATEMENT OF THE CASE

On November 8, 1982, petitioner filed an "Amended Petition for a Writ of Habeas Corpus", together with a motion for an Order staying his execution, in the United States District Court for the Northern District of Florida, in Tallahassee, Florida.

On November 10, 1982, United States District Judge Maurice M. Paul entered an Order staying petitioner's execution; a copy of the order is attached as Appendix F to the Petition for Writ of Certiorari.

Respectfully submitted,

Stephen Stitt

STEPHEN STITT
86 Bay Drive
Key West, Florida 33040

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DOUGLAS RAY MEEKS,

Petitioner,

vs

LOUIS WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, RICHARD DUGGER, Superintendant of Florida State Prison at Starke, Florida, and JIM SMITH, the Attorney General of the State of Florida,

CASE NO. TCA 82-146

Respondents.

O R D E R

Douglas Ray Meeks, petitioner in this habeas corpus proceeding, on November 8, 1982 filed his amended federal habeas corpus petition and simultaneously filed a motion for stay of execution of a death sentence set for November 16, 1982. This Court has jurisdiction to consider a stay of execution pursuant to 28 U.S.C. §2251.

This Court is of the opinion that it is legally compelled to grant the motion for stay of execution in view of the fact that one of the federal constitutional issues raised by the petitioner is identical to one heard by the Eleventh Circuit Court of Appeals sitting en banc, Ford v Strickland, ____ F.2d ____, No. 81-6209 (April 15, 1982), vacated and rehearing en banc ordered, ____ F.2d ____ (April 28, 1982) (oral argument held June 15, 1982). That Court has indicated that it is appropriate for district courts to grant stays of execution in those death cases where the petitions for writs of habeas corpus raise the issue of the Florida Supreme Court's ex parte solicitation of extra-record material. See Shriner v Wainwright, ____ F.2d ___, No. 82-5469 (11th Cir. April 20, 1982); Booker v Wainwright, ____ F.2d ___, No. 82-5468 (11th Cir. April 20, 1982); Goode v Wainwright, supra; Dobbert v Strickland, 670 F.2d 938 (11th Cir. 1982); and the cases cited therein at 670 F.2d at 940. The Eleventh Circuit has labelled the issue

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TALLAHASSEE, FLA.

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"a serious and difficult one". Goode v Wainwright, 670 F.2d 941, 942 (11th Cir. 1982). It is therefore inappropriate for this Court to reach the merits of petitioner's writ of habeas corpus until such time as the Eleventh Circuit has rendered its final decision in Ford v Strickland, supra. See Eleventh Circuit Rule 26(i) (the effect of granting a rehearing en banc is to vacate the panel opinion and to stay the mandate).

Accordingly, it is

ORDERED:

1. Petitioner's application for a stay of execution is hereby GRANTED and Petitioner's execution is hereby STAYED pending further Order of this Court;

2. Petitioner is to remain in the custody of the Superintendent of the Florida State Prison at Starke, Florida, pending further Order of this Court;

3. The Clerk of this Court shall give immediate telephonic notice to the Secretary of the Florida State Prison at Starke, Florida; to Jim Smith, the Attorney General of the State of Florida; and to Robert Graham, the Governor of the State of Florida that the Petitioner's execution is STAYED by Order of this Court, and a certified copy of this Order shall be subsequently served upon those persons by the United States Marshal.

DONE AND ORDERED in chambers at Tallahassee, Florida this 10th day of November, 1982.

Maurice M. Paul
United States District Judge

ORIGINAL

No. 82-5744

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DOUGLAS RAY MEEKS,

Petitioner,

v.

LOUIE L. WAINWRIGHT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

JIM SMITH
Attorney General

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QUESTIONS PRESENTED

I. WHETHER THE LOWER COURT ERRED IN REFUSING TO ALLOW PETITIONER TO PRESENT EVIDENCE OF ALLEGED RACIAL ATTITUDES PREVALENT IN PERRY, TAYLOR COUNTY, FLORIDA, AT THE TIME OF HIS TRIAL

II. WHETHER THE LOWER COURT ERRED IN REFUSING TO HOLD THAT ANY OF THE ALLEGED TRIAL ERRORS WERE SO FUNDAMENTAL AS TO REQUIRE A RETRIAL AS TO GUILT AND/OR SENTENCE.

III. WHETHER THE LOWER COURT ERRED IN DETERMINING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

IV. WHETHER THE LOWER COURT ERRED IN IMPLICITLY HOLDING THAT PETITIONER WAS AFFORDED AN ADEQUATE HEARING ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

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PRELIMINARY STATEMENT

The complete record on appeal as filed in the Florida Supreme Court which is the subject of this certiorari proceeding is submitted herewith and references thereto will be made by the symbol "App." followed by appropriate page number.

OPINION BELOW

The opinion of the lower court is reported as Meeks v. State, 418 So.2d 987 (Fla. 1982).

JURISDICTION

Respondent has no quarrel with the jurisdiction of this court pursuant to Title 28, U.S.C., § 1257(3), or any other provision thereof, at least for the purpose of determining whether to decline assumption thereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the constitutional and statutory provisions involved as set forth on p. 1 of the petition.

STATEMENT OF THE CASE

On March 12, 1975, petitioner was convicted and sentenced to death for the murder of Lloyd Walker (lower court case No. 74-299-CF). The Florida Supreme Court affirmed, opinion reported at 399 So.2d 186 (Fla. 1976). On May 6, 1977, that court issued a Gardner[1] order directing the trial judge to state whether his sentence was based on any information not known to petitioner. On May 18, 1977, the trial judge responded that he had relied in part on a psychiatric report which had not been furnished to

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1/ Gardner v. Florida, 430 U.S. 349 (1977).

petitioner. The lower court then remanded the cause to the trial court for an evidentiary hearing on the issue, at which time it was learned that petitioner's trial counsel had been present during the examination upon which the report was based. Petitioner was afforded an opportunity to rebut the contents of the psychiatric report, but his testimony at the hearing only confirmed the report's accuracy. On November 2, 1978, the lower court reaffirmed the death sentence, 364 So.2d 461 (Fla. 1978). Petitioner then sought review of his original conviction and sentence, as well as the Gardner proceeding by a petition for writ of certiorari to this Court which was denied, 439 U.S. 991 (1978).

On June 4, 1975, petitioner was convicted and sentenced to death for the murder of Chevis Thompson (lower court case number 74-300-CF).[2] The Florida Supreme Court affirmed the conviction and sentence on July 21, 1976, opinion reported at 336 So.2d 1142 (Fla. 1976). In response to the lower court's Gardner order of May 6, 1977, the trial judge stated that his sentence had been based exclusively on information known to petitioner. On January 11, 1979, the lower court issued an order declaring this case final.

Petitioner filed motions for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure on December 11, 1979 (directed to Case No. 74-299-CF), and on December 31, 1979 (directed to case number 74-300-CF). On January 31, 1980, the trial judge denied a motion for evidentiary hearing. A second hearing was held on February 5, 1980, to determine whether a stay of execution should be granted and whether petitioner was entitled to the relief requested in his

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[2]/Lower court case numbers refer to the case number in the trial court.

Rule 3.850 motions. Pro forma orders denying relief were filed on February 5, 1980. However, an amended order dated February 8, 1980 was filed by the trial judge denying petitioner's motion for post-conviction relief in case number 74-299-CF.

On appeal to the Florida Supreme Court, Meeks v. State, 382 So.2d 673 (Fla. 1980), that court set forth the numerous grounds urged for relief in petitioner's motions for post-conviction relief and then concluded as follows:

> All except two of the foregoing issues were or could have been raised on direct appeal and therefore are foreclosed in this proceeding for collateral review. Adams v. State, 380 So.2d 423 (Fla. 1980). Henry v. State, 377 So.2d 692 (Fla. 1979); Sullivan v. State, 372 So.2d 938 (Fla. 1979). The two grounds cognizable for collateral attack here are the allegations of ineffective assistance of counsel and racial discrimination in capital sentencing (grounds 1 and 4 in both rule 3.850 motions).

Id. at 675. However, after further discussion the lower court determined that petitioner was not entitled to an evidentiary hearing respecting his contention that the Florida death penalty statute was imposed in an unconstitutionally discriminatory fashion. See also the concurring opinions of Justices Overton and Sundberg and the dissenting opinion of Justice Adkins. Meeks, 382 So.2d 676-678. The case was remanded to the trial court for a prompt evidentiary hearing on the question of ineffective assistance of counsel.

Following a plenary hearing on September 16-18, 1980, the trial judge denied relief and on appeal the Florida Supreme Court affirmed. Meeks, 418 So.2d 987 (Fla. 1982).

Preliminary Remarks

It is respondent's position that the only viable issue before this Court is that of ineffective assistance of counsel.

All other issues that petitioner seeks to raise have been foreclosed by procedural default in state courts. The defaults were not excused or waived by the Florida Supreme Court. Meeks, 382 So.2d, at 675. It is the law in this jurisdiction that any issue that could or should have been raised on direct appeal cannot serve as a ground for relief in a post-conviction proceeding. Von Eberstein v. State, 270 So.2d 444 (Fla.1st DCA 1972), on reh. granted; Johnson v. State, 364 So.2d 118 (Fla.1st DCA 1978); Williams v. State, 371 So.2d 110 (Fla.1st DCA 1978). The teaching of these cases is that matters known at the time of trial are not appropriate for collateral attack, and that collateral attack will not serve as a substitute for appeal. State v. Matera, 266 So.2d 661, 666 (Fla. 1972). Respondent relies on Engle v. Isaac, ___ U.S. ___, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982), and Wainwright v. Sykes, 433 U.S. 72 (1977).

REASONS FOR NOT GRANTING THE WRIT

1.

The Decision of the Florida Supreme Court That Petitioner Received Reasonably Effective Assistance of Counsel is Correct.

At the evidentiary hearing in Perry, Florida, on September 16-18, 1980, the claim of ineffective assistance of counsel was set against a background of testimony from persons who were never qualified on the record as an expert in the area about which they testified. Additionally, the claim of racial unrest was made based on a claimed discrimination in the disbursement of monies in the rendering of municipal and county services in Perry, Taylor County, Florida.

David Lipman was the first witness called by petitioner at the evidentiary hearing (App. 17). This witness was never qualified as an expert in anything. Presumably, the witness was

called to testify as to the disbursement of municipal and county services in Perry, Florida, and prevailing racial attitudes in that city during March and June of 1975 (App. 23, 26). The trial judge sustained the objections properly made to this type of testimony (App. 26). However, the trial judge did permit a proffer of Mr. Lipman's testimony (App. 45-65). In his proffered testimony, Mr. Lipman gave it as his opinion that Perry, Florida, is largely residentially segregated and this conclusion is based on what he referred to as segregation index demographic studies (App. 54). As a result of his studies and interviews done in Taylor County by himself or someone under his supervision, Mr. Lipman stated that it was his general impression that if you are white and you have complaints about city and county government, then the city or county will respond to your requests. However, if you are black, then the city or county either denies your requests, there is no follow-through, or rejects your request or demand (App. 60). On cross-examination, Mr. Lipman admitted that the opinions expressed were based upon the preparation made for a pending lawsuit against Taylor County and the City of Perry (App. 67). Mr. Lipman further admitted that Perry was not the only city against which he had brought law suits in behalf of black people (App. 72). In fact, he was preparing to file or had filed a suit against the City of Live Oak, Florida. A case against the City of Ft. Myers was presently on appeal (App. 73). He was involved in a suit against the City of Apopka, Florida (App. 74). Indeed, Mr. Lipman was involved in lawsuits pending against Marianna, Chipley, Quincy, Okeechobee, and Tarpon Springs, Florida. He then admitted that racism and patterns of discrimination were not confined to Taylor County, Florida (App. 75, 76).

The next witness to testify for petitioner was Gerald Shofner (App. 79). This witness was never qualified as an expert in any field of endeavor. Mr. Shofner is an author and his field

is history and political science (App. 79). Apparently, counsel for petitioner was attempting to qualify Mr. Shofner as an expert historian specializing in race relations in Florida for the purpose of having him state his opinion as to "what is behind disparities" in services in Taylor County and Perry, Florida (App. 86). An objection was lodged to this type of testimony and we think counsel aptly stated the point as follows:

> Counsel is attempting to establish that competency of counsel required one to hire a Ph.D. with expertise in race relations and hire a civil rights lawyer to do 750-850 hours of research to conclude that racism exists in this county -- that's the only reason that I can see for the testimony of either of these two witnesses having been proffered but it has no bearing to any issue before the Court.

(App. 86) The objection was sustained by the trial judge (App. 87). However, the trial judge did permit a proffer of Mr. Shofner's testimony (App. 88-92). On cross-examination, this witness admitted that he had not made any examination or study of court records for the purpose of determining whether jury verdicts in Taylor County reflected a pattern of discrimination against blacks (App. 92).

Petitioner next called Wayne David Griffin to testify in his behalf (App. 94). Mr. Griffin was a preacher but was never qualified as an expert in theology or anything else. Apparently, the thrust of this witness's testimony was that he was aware of racial tensions in Perry through his own experiences (App. 97). Interestingly, in answer to one of the questions propounded by counsel for petitioner, Mr. Griffin stated that he was not aware of any school being closed in the fall of 1974 because of racial tension (App. 100). The purpose of this witness' testimony was well stated by one of petitioner's counsel as follows:

> Our intention all along has been that one of the failings of trial counsel was not to explore the atmosphere of the community at the time.

(App. 101) This bears out the truthfulness of the state attorney's remarks hereinabove quoted. The state attorney again remarked on what petitioner was attempting to do. Note the following:

> Secondly, what we have here is not an attempt to show incompetency of counsel, what we have here is an attempt guised, thinly guised, to impeach the jury's verdict by showing that Taylor County and Perry is such a hotbed of racism that it's impossible to obtain a fair trial. Now that's what counsel has attempted here, this has nothing to do with the competency of counsel.

(App. 102)

The next witness called by petitioner was Jimmy Hunt. This witness was never qualified as an expert in anything (App. 107). Mr. Hunt is a lawyer and worked as an assistant public defender. In fact, Mr. Hunt was counsel for petitioner's codefendant Homer Lee Hardwick (App. 108). Mr. Hunt stated that there were other avenues of gaining information rather than through the taking of depositions (App. 115). Petitioner's counsel through this witness sought to show that at the time this witness deposed petitioner, petitioner's counsel, John F. Howard, was not present. Mr. Hunt admitted, however, that he did not know whether petitioner's attorney was ever given notice as to the taking of the deposition (App. 119). Mr. Hunt at no time testified that in his opinion petitioner received ineffective assistance of counsel. He did state that in certain instances things done or not done by petitioner's trial counsel could be considered as evidence of ineffectiveness. On cross-examination, Mr. Hunt admitted that the motion to dismiss the indictment filed in the Homer Lee Hardwick case was denied and that it was something of an exercise in futility (App. 125). As to his motion for change of venue filed in the Hardwick case, Mr. Hunt stated that he did not consider that the court abused its discretion in denying the motion. This was based on the answers

given by prospective jurors on their voir dire examination (App. 126). As a matter of fact, this issue was never raised on appeal in the Hardwick case (App. 126). In other words, based on responses as given, this witness was of the opinion that his client would receive a fair and impartial trial by an unbiased jury (App. 127). This witness also acknowledged that there were other means of gaining information rather than by the taking of depositions (App. 128). He admitted that there were circumstances where depositions were not absolutely essential (App. 130). Mr. Hunt on redirect examination stated that as to whether it would be prejudicial to allow in evidence a co-felon's fingerprints would depend on the case. In circumstances where defense strategy was to argue that the primary responsibility was for the codefendant, then the admission of such fingerprints would not be prejudicial (App. 135). Again, this witness never stated that it was his opinion that petitioner received ineffective assistance of counsel.

The next witness called by petitioner was Stephen N. Bernstein. This witness stated that he was a lawyer employed by the public defender's office in Gainesville, Florida (App. 142). However, he was never qualified as an expert witness. Mr. Bernstein gave a long dissertation as to what is involved in defending a capital case and what he usually does when he represents a defendant on a capital charge (App. 149-164). In the defense of a capital crime, this witness gave it as his opinion that voir dire was fifty percent of what the attorney had to do (App. 165). He stated that in reading the voir dire examination of the prospective jurors he noticed several things that were not done that he would have done (App. 166-170). Please note that the two jurors, Mr. Bowden and Mrs. McNease, on which this witness found fault with petitioner's trial counsel's voir dire examination were subsequently excused on peremptory

challenge by trial counsel (App. 169, 170). Mr. Bernstein stated that he probably would personally have asked more questions but could not state that it was ineffective assistance as it could be a strategy decision (App. 170). When asked whether petitioner's trial counsel's alleged faulty voir dire examination of the prospective jurors constituted ineffective assistance of counsel, this witness answered that it would, indirectly (App. 171, line 8). Next, the testimony of this witness was proffered as to how he would be affected upon learning that the city and county governments in Perry, Florida, were discriminating to the disadvantage of black people. Then followed a long series of questions and answers designed to bring out just how this witness would be affected by such information in his trial of a capital case (App. 178-183). Interestingly, when asked if there could be any strategy reasons for not using all of the peremptory challenges in a capital trial, this witness answered that there could always be strategic reasons for not doing that (App. 189, 190). The witness was next asked twice whether he would consider it evidence of ineffectiveness not to exercise more challenges or to require further regarding challenges (App. 190, 191). Please note, the witness would not state that he considered it even an indication of ineffective assistance of counsel but only that in his opinion it was an indication that petitioner's trial attorney did not give a great deal of thought to the area of possible community prejudice (App. 191). The witness was next asked if he had formed an opinion from reading the transcript of the voir dire examination as to whether it was an effective voir dire examination. The witness replied that he would have to say that it was "inadequate." (App. 194) The witness finally gave it as his opinion that petitioner's trial counsel gave ineffective assistance to petitioner during the penalty phase of the trial (App. 206-208). On cross-examination, this witness admitted that the record of the voir dire examination did not include such

things as consultation with the client. He admitted that the record of the voir dire examination did not include the personal knowledge of the jurors or even the venire (App. 214). When asked whether the question of the codefendant's fingerprints could be a question of trial strategy or trial tactics, the witness replied that it certainly could (App. 215). The witness admitted that there were other valid and effective means of discovery other than by deposition (App. 219). The witness frankly admitted that in the trial of cases, a trial lawyer could look back and second-guess on a number of things (App. 222). Mr. Bernstein was, of course, opposed to the imposition of death as punishment (App. 224).

The next witness called by petitioner was Craig Barnard who is a lawyer and assistant public defender in West Palm Beach, Florida (App. 237). Mr. Barnard was never qualified as an expert witness. This witness was not too sure about anything. His remarks were usually prefaced by the words, "I think" (App. 243), or qualified by the words, "very difficult to judge." (App. 244, line 7). See also his answer to the question of whether or not the failure to pursue a remedy would be evidence of ineffective assistance of counsel (App. 250, line 11). In answer to another question propounded to him, the witness remarked as follows: "That indicates to me, I would not say that is ineffective per se, I would not say that, ..." (App. 256, lines 14, 15) Again, in answer to a question propounded to him, this witness remarked: "I would not say failure to object to those portions are ineffective per se, ..." (App. 258, lines 13, 14) However, Mr. Barnard did conclude by saying that in his opinion petitioner did receive ineffective assistance of counsel during the penalty phase of his trial (App. 262). It is understandable why there was no attempt to qualify Mr. Barnard as an expert in the trial of capital cases. On cross-examination when asked how

many capital cases he had tried, the reply was, "none." (App. 273, line 4) Mr. Barnard was frank enough to admit that as an appellate attorney he could take a trial transcript and virtually pick it apart (App. 275).

David Mack was next called to testify on behalf of petitioner. This witness was not qualified as an expert in anything (App. 286). Apparently the purpose of calling this witness was to have him testify that discrimination based on race still exists in Perry, Florida. Objections to this type of testimony were sustained and his testimony was received on proffer (App. 303-308).

The next witness called by petitioner was Jeff Smith. Mr. Smith simply testified that he had worked with the prior witness, David Mack (App. 310-312).

The first witness called by respondent at the evidentiary hearing was John Weed. Mr. Weed stated that he was an attorney and that a significant portion of his practice consisted of criminal cases (App. 315, 316). He was tendered as an expert in the field of criminal trial practice and counsel for petitioner had no objection to his expertise in this area (App. 317). Mr. Weed testified that he had read the trial transcript in the case of Douglas Ray Meeks, this would be the first trial, and that as a result thereof he gave it as his opinion that petitioner's trial counsel rendered petitioner reasonably effective assistance (App. 325). This was Mr. Weed's opinion in spite of the fact that he was personally opposed to the death penalty (App. 328).

The next witness called by respondent was Martin S. Page, an attorney who had been practicing a little more than sixteen years (App. 336). After eliciting his qualifications, he was tendered as an expert in the field of criminal trial practice (App. 338). The trial judge found that the witness was qualified

and entitled to give testimony as an expert witness (App. 239).

Please note the following quoted from the record:

> Q: Mr. Page, at the request of the office of the State Attorney, have you read the trial transcripts in the case of Bar [sic], the State of Florida versus Douglas Ray Meeks?
>
> A: Yes.
>
> Q: Looking at the record as a whole, based on the State's case and the evidence presented and the apparent defenses or the lack of defenses available, what is your opinion as to the effectiveness of trial counsel?
>
> A: Well, if I might qualify my view, I think I have already expressed to you, I'm not quite sure what is understood by effectiveness. I equate it to competence, I guess, and I would say it was a transcript as I read it in both cases, I would say a reasonably competent job. Q: Do you feel that the trial attorney in this particular case did an adequate job of preserving objections for appeal?
>
> A: Yes, those points I saw that might be questionable I think he did.
>
> Q: Did you note in either trial, any particular aspect which you would consider as clear evidence of incompetency on the part of the defense counsel?
>
> A: No sir.
>
> * * * * *
>
> Q: Mr. Page, assuming any defense counsel you know handled the case of State versus Douglas Ray Meeks case 299, do you have an opinion of whether or not that result would have been the same?
>
> A: Yes, I have an opinion.
>
> Q: And what is that opinion sir?
>
> A: It would be highly probable that a coviction could have resulted.

(App. 339, 340, 342)

Elizabeth Bell was called to testify in behalf of petitioner. She was qualified as an expert in child development (App. 355). An objection to this witness's testimony on the ground of relevancy was sustained by the trial judge (App.

362). This witness's testimony was then elicited on proffer (App. 364-387). The thrust of her testimony on proffer was that petitioner was an impressionable person (App. 379) and that he was susceptible to being led by a more dominant person (App. 380, 381). However, on cross-examination it was brought out that the first time this witness had ever physically met petitioner was that very morning (App. 382). At the conclusion of this witness's testimony, the assistant state attorney, Mr. Bean, announced that petitioner's trial counsel, Mr. Howard, was available to testify and could be called if petitioner so desired. Petitioner decided not to call Mr. Howard to testify in his behalf (App. 388, 389). Since the burden of proof is on petitioner at an evidentiary hearing, the strategy of this decision escapes respondent.

The next witness called by respondent was Virlyn Willis, an attorney who was qualified as an expert in the field of criminal trial practice (App. 390, 395). Mr. Willis gave it as his expert opinion that John Howard did give petitioner reasonably effective assistance of counsel. Note the following:

> Q: All right, sir, in your opinion as a prosecuting attorney in the Meeks' cases and as an expert in the field of criminal trial practice, did Mr. John Howard, the trial counsel for defendant Meeks, reasonably, give Mr. Meeks reasonably effective representation?
>
> A: Yes. Q: Can you recall any particular point in either trial which you would consider as clear evidence of incompetency on the part of defense counsel?
>
> A: No.

(App. 396)

Jimmy Hunt was recalled as a witness for petitioner (App. 437). On cross-examination, Mr. Hunt was asked if he had an opinion as to the reason for the difference between the sentences imposed on Meeks and on his codefendant, Hardwick. He answered as follows:

> A: I thought that throughout that Meeks case was different, that Meeks was the more culpable between the two - the evidence indicated - Meeks was in control throughout the commission of this crime. The testimony was that he was the one that gave the directions to Dianne, I don't recall her last name, the Clerk, and the deceased, Lloyd Walker to go back to the store.
>
> He was the one that had the gun in his hand throughout, Hardwick never said anything, and the last time that Dianne, the only witness alive to testify that had actually saw the gun in Meeks' hand, and strong reason to believe, that he fired the fatal shots.

(App. 441) In weighing the comments of Mr. Hunt, it should be remembered that he was counsel for petitioner's codefendant and was thoroughly familiar with the facts of the case.

Following the evidentiary hearing, the trial judge by order dated October 22, 1980, found that petitioner received reasonably effective assistance of counsel at trial and on appeal and consequently denied the motion to vacate judgment and sentence in Case Nos. 74-299-CF and 74-300-CF (APp. 37-39). On appeal, the Florida Supreme Court affirmed. Meeks v. State, 418 So.2d 987 (Fla. 1982).

At the evidentiary hearing before the trial court, counsel for petitioner sought to compare the result reached in the Hardwick case (life imprisonment) with that of petitioner (death penalty) on the basis that Hardwick received effective assistance of counsel, whereas petitioner did not. The Florida Supreme Court spoke to this precise issue and we quote the following:

> We are extremely sensitive to the demands of equality before the law in cases in which we must consider whether a sentence of death should be upheld. . . . But there was evidence, discussed above, from which the jury in Hardwick's trial could have concluded that Meeks was the dominant figure in this criminal episode. . . . The presence of such testimony, accompanied by Hardwick's youth, sufficiently differentiates the cases of the two men so that Furman's dictates are not violated by the imposition of different penalties.

339 So.2d, at 192.

In contemplating the services rendered by Mr. Howard in behalf of petitioner, one really begins to wonder just what degree of expertise is necessary on the part of defense counsel in order to withstand the charge of ineffective assistance. Without risk of exaggeration, respondent states that when this charge is viewed in the light of what Mr. Howard actually did in representing petitioner, it becomes an absurdity. Frankly, the charge is so ridiculous that the necessity of refuting same lends it an undeserved dignity.

The standard for constitutionally effective assistance of counsel is "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974)(quoting MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), adhered to in pertinent part on rehearing en banc, 289 F.2d 928 (5th Cir.), cert.denied, 368 U.S. 877 (1961). The stating of the correct rule is relatively easy; the difficulty arises in the application of the facts to the rule in order to determine the issue of reasonably effective assistance of counsel. We think that Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), correctly teaches that reasonably effective assistance must be judged from the perspective of counsel, taking into account all the circumstances of the case, but only as those circumstances were known to him at the time in question. Viewing matters from the perspective of trial counsel, it is good to appreciate that the presumption is that counsel rendered effective assistance and to overcome that presumption on collateral attack, petittioner must shoulder a heavy burden. Catches v. United States, 582 F.2d 453 (8th Cir. 1978); Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976), cert.denied, 492 U.S. 1053. When this presumption is viewed against the background of Mr. Howard's representation of

petitioner, it literally precludes petitioner's claim of ineffective assistance.

A defendant has the right to reasonably effective assistance of counsel but he does not by any stretch of the imagination have the right to errorless counsel. United States v. White, 524 F.2d 1249 (5th Cir. 1975); cf. Tollett v. Henderson, 411 U.S. 259 (1973). Certainly, mere mistakes in judgment or even failure to recognize and investigate certain defenses does not necessitate a new trial, Tollett v. Henderson, supra, and a court should not measure the competency of counsel's advice by retrospectively considering whether it was right or wrong, but should confine the inquiry to the question of whether counsel's representation was within the range of competence demanded of attorneys in criminal cases. McMann v. Richardson, 390 U.S. 759 (1970). We think these principles have been rather neatly summed up by the Eighth Circuit in Johnson v. United States, 506 F.2d 640 (8th Cir. 1974), cert.denied, 420 U.S. 978 (1975), where it said:

> The term "effective," in its most general application, describes something which ultimately achieves a desired result. With reference to professional representation in criminal cases, that might be interpreted to mean achieving only outright acquittal of the defendant on the charges without regard to the weight and strength of the evidence adduced. A more appropriate nomenclature for the standard would be to test for the degree of competence prevailing among those licensed to practice before the bar. The standard would refer more precisely to the professional competence of one who has completed a long and arduous course of study for a professional license, and who has acquired some experience in applying legal principles and conducting court trials.
>
> The professional standard could be said to include the responsibility to insure that the client is tried according to the applicable rules of evidence and practice and to urge such arguments on a client's behalf as are indicated by the evidence, or lack of evidence, adduced. It is not,

> however, constitutionally limited to an "effective" type of representation that would achieve acquittal of a defendant on any charge regardless of the facts. The constitutional provision includes neither "effective" nor "adequate" nor other adjectival terms in its guarantee of assistance of counsel. It merely states in plain language that "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defense." U.S. Const.Amend. VI.

Id. at 646. (Footnotes omitted.)

Neither should petitioner be heard to argue that the standard for effective assistance in capital cases is greater than in noncapital cases. It is submitted that in neither capital nor noncapital cases is a defendant entitled to perfect or error free representation. The number, nature, and seriousness of the charges against the defendant are all part of the totality of circumstances in the entire record that must be considered in the effective assistance calculus, just as are the strength of the prosecution's case and the strength and complexity of the defendant's possible defenses. Nonetheless, while the facts that must be considered will differ in each and every case, the legal standards for constitutionally effective assistance of counsel are constant. Washington v. Watkins, 655 F.2d 1346 1357 (5th Cir. 1981), cert.denied, 102 S.Ct. 2021 (1982). It is inconceivable that the effectiveness of counsel would require an imaginative assertion of every possible theory of defense or mitigation which might in the unpredictable future turn out to be accepted by some court, some day, in some case. Respondent submits that the adequacy of representation which petitioner received should be decided on an evaluation of services rendered in his behalf. This is so because a retrospective examination of a lawyer's representation for the purpose of determining whether same was free from error would surely exact a higher measure of competency than the prevailing standard. McMann v. Richardson, supra.

It is believed that the position of the Fifth Circuit is particularly well stated in Williams v. Beto, 354 F.2d 698 (5th Cir. 1965), as follows:

> Moreover, the fact that some other lawyer followed a different course in another case, or would have done differently had he been acting as counsel, is no ground for branding the appointed attorney with the opprobrium of ineffectiveness, or infidelity, or incompetency. The practice of law is an art as well as a science. As no two men can be exactly alike in the practice of the profession, it is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight. Scott v. United States, (6 Cir., 1964), 334 F.2d 72, cert. den. 379 U.S. 842, 85 S.Ct. 81, 13 L.Ed.2d 48.
>
> Court appointed counsel is no different to any other lawyer. He is still a lawyer, he is still practicing law, and he is no less confronted by difficult decisions of tactics and strategy. He cannot stand still and do nothing. That indeed might be the best evidence of incompetency, or infidelity, or ineffectiveness, or all three. He must decide as his knowledge, experience, and talents best permit, and then move ahead. When he does this, that is all any lawyer can do, and the client has no right to complain of the absence of a miracle. Hickock v. Crouse, (10 Cir., 1964), 334 F.2d 95, cert.den. 379 U.S. 982, 85 S.Ct. 689, 13 L.Ed.2d 572, and Smith v. Crouse, 379 U.S. 982, 85 S.Ct. 690, 13 L.Ed.2d 572, reh.den. two cases, 380 U.S. 928, 85 S.Ct. 908, 13 L.Ed.2d 817.

Id. at 706.

In determining whether petitioner has been provided with reasonably effective assistance of counsel, it is believed that the decision in United States v. Decoster, 624 F.2d 196 (D.C.Cir. 1979), en banc, provides informative guidance. There, the District of Columbia Circuit remarked in pertinent part as follows:

> A shortfall by defense counsel that is perceptible but is modest rather than egregious is no basis for judicial interposition--as appears from Agurs, Bruce, Saferian and the other cases cited.
>
> * * * * *

> In the absence of a governmental impediment to effective assistance of counsel, the court cannot lightly vacate a conviction on the basis of its own appraisal of the performance of defense counsel. The door is open, but only for cases of grievous deficiency and where the court has serious misgivings that justice has not been done. Our adversary system will be tortured out of shape if defense counsel must contemplate from the beginning that the judge will subsequently retrace his conversations with his client, and his evolving perceptions of the problems and possibilities presented by the assignment.

Id. at 208, 214.

In the final analysis, the law does not require that a defendant receive a perfect trial, but only a fair one. Michigan v. Tucker, 417 U.S. 433 (1974). The perspective from which a claim of ineffective assistance is to be evaluated is whether counsel's representation falls below the constitutionally minimum level. This ultimate question is not whether the representation was zealous or might have been better. Pollinzi v. Estelle, 628 F.2d 417 (5th Cir. 1980); United States v. Garcia, 625 F.2d 162 (7th Cir. 1980); Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980), en banc; Herring v. Estelle, supra. It is not enough to find that counsel's action did not satisfy abstract norms or satisfy a checklist of general standards which are suggested as "should normally be dones." "Below the minimum level" must mean just that. It does not mean below the average. For, to be below average would mean that counsel, by definition, would not satisfy the constitutional standard half of the time. United States v. Decoster, supra; Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), en banc. With these thoughts in mind, respondent believes that the following quoted from the opinion in Jones v. Estelle, 632 F.2d 490 (5th Cir. 1980), is an appropriate note on which to bring this brief to a close:

> We decline to evaluate the propriety of trial counsel's actions with the aid of the refractive correction of hindsight.

Id. at 492.

CONCLUSION

The Florida Supreme Court quoting from Knight v. State, 394 So.2d 997 (Fla. 1981), remarked that: "The defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." Meeks, 418 So.2d, at 989.

The petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief in Opposition to Mr. Stephen Stitt, Attorney at Law, 86 Bay Drive, Key West, Florida 33040, by U.S. Mail, this 15th day of December 1982.

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of Counsel